WOMEN AND LEGAL ACTION

Precedents, Resources and Strategies for the Future

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The views expressed, and the conclusions drawn, are attributable to the authors alone. We present it in the sincere hope that it will be of interest and use in the ongoing campaign for equality for Canadian women.

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INTRODUCTION

The pursuit of equality for women in all aspects of Canadian life has highlighted the importance of the laws which govern us and the ways in which those laws are interpreted by our courts. Historically, our laws have crystallized society's views of women and men. As those views become outdated or unacceptable, we challenge them and the laws which embody them, in the halls of government and in the courts. That process has been going on for over a century.

The proclamation on April 17, 1982, of the **Constitution Act, 1982,**[1] which includes the **Canadian Charter of Rights and Freedoms**[2] (the "Charter"), begins a new stage in our pursuit of equality.

The Charter contains, notably in sections 15(1) and 28, an express commitment to the goal of equality for men and women and an expanded description of the scope of that equality. These provisions read as follows:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability . . .
>
> 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

All federal and provincial laws in force in Canada are subject to these and other requirements of the Charter and, where there is an inconsistency between the Charter and a provision of the law, the Charter prevails and the provision has no force.[3]

However, as we know only too well, meaningful implementation of any law is not guaranteed by mere passage. We cannot assume that our task is finished. Collective action by women resulted in improved wording in the Charter. Given that the Charter will be interpreted by courts, we should consider how to organize to ensure future progress in the achievement of equality.

Courts, judges and tribunals play an important role in law reform. Although they proceed on a case-by-case basis, deciding each case on its own facts, they are guided by legal principles previously developed in similar cases. The earlier judgement or decision which establishes the legal principle and becomes the authority for subsequent decisions is known as a "precedent". Not every case establishes a precedent. As a result, law reform by courts and tribunals takes place in stages over a period of years as each case contributes to the development of the interpretation of the law. Using litigation to further law reform therefore necessitates organized activity sustained over a period of years.

The **Canadian Charter of Rights and Freedoms** is part of a legal system with well-established precedents. It is, however, a new legal instrument which, unlike most laws passed by Parliament and provincial legislatures, is part of the Constitution of Canada. Many of the precedents already developed by courts in the interpretation and application of ordinary laws will no longer automatically apply because of its special status. For this reason, cases brought under the Charter in the early years of its implementation will have a great potential for establishing precedents which in turn will affect future cases. The challenge presented by the Charter is immediate and vital.

On May 31, 1981, the Canadian Advisory Council on the Status of Women held a conference titled "Women and the Constitution: The Next Five Years". One of the speakers, when discussing the implementation of the Charter, suggested that we must begin to think in new terms about strategies to bring women's issues successfully before the courts. Drawing upon the American experience, it was suggested that "legal defence funds" might be useful in Canada. The term "legal defence fund" was adopted by the National Association for the Advancement of Colored People Legal Defense and Educational Fund (NAACP LDEF), incorporated in 1939, to describe itself and now has come into wider use, as a generic term describing a type of public interest law organization. Such funds provide assistance to someone bringing or defending actions which will contribute to the development or elucidation of law in a particular area. In fact, they could more properly be described as "legal action funds".

The Canadian Advisory Council on the Status of Women agreed with participants at the conference that it would be timely and useful to examine how legal action funds operate in the United States and how they might function in Canada. As a result it commissioned this study. The Council does not suggest that a fund, or any particular type of fund, should be established. It is hoped, however, that the resources collected together in this volume will enable groups and individuals to consider whether a fund or funds should be established, and offer some help in structuring such a fund.

This study examines a number of areas. First, it discusses the rationale for undertaking legal action in order to achieve change in the law and gives examples of action undertaken by Canadian women in past years. Next, it considers some of the practical aspects in bringing a case to court, and attempts to acquaint the reader with resources which already exist in the community to assist in raising legal issues. The study goes on to describe some existing Canadian "legal action funds": these do not deal with women's issues, but they are useful sources of information for those wishing to establish a Canadian women's fund or funds. The study then examines legal action funds in the United States, most of our examples being those which deal with sex discrimination issues. Lastly, we draw parallels and examples from the American experience which may be useful to Canadians.

Chapter I
THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: AN OPPORTUNITY

Legal issues of vital importance to Canadian women have arisen in a variety of contexts, including labour law, human rights law and family law. These cases involve statutes such as the **Criminal Code**,[1] **Unemployment Insurance Act**,[2] **Indian Act**[3] and the **Divorce Act**,[4] as well as the more fundamental constitutional enactments, the **Constitution Act, 1867**,[5] and the **Canadian Bill of Rights**.[6]

Enactment of our new **Canadian Charter of Rights and Freedoms** has added a significant means of seeking clarification and strengthening of women's rights in Canada. In addition to the protection offered by sections 15 and 28, there are also qualified guarantees in the Charter with respect to fundamental freedoms, democratic rights, mobility rights, and legal rights, as well as certain protections for the use of Canada's official languages and for affirmative action programs.

How, then, will women be able to use these new rights given in the Charter? The most obvious way is to use them defensively. For example, a woman charged with soliciting for the purposes of prostitution, under section 195.1 of the **Criminal Code**, may argue that her guarantee of equality before the law is infringed if the male customer is not also charged.[7]

However, it is important to note that the Charter makes it clear that people need not wait until they are forced to defend themselves against government action before raising a point connected with their rights. Section 24 of the Charter provides that "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." This provision challenges us to take the initiative in raising legal issues of importance before the courts, rather than simply waiting to respond to government action. The Charter is a useful new tool. How the Charter is used, developed, and interpreted by the courts in the first few years of its existence will prove very significant.

Another aspect of the Charter has great potential, although whether it is potential for harm or for good will largely be determined by the efforts of women in

the first three years after the patriation of the Canadian Constitution in 1982. Section 32 of the Charter provides that the equality guarantees in section 15 are not to come into effect for three years after patriation (that is, in April 1985). In theory, this three-year moratorium is to give the federal and provincial governments the chance to review their legislation and prepare amendments to bring it into line with the requirements of section 15. Unfortunately, this three-year delay could also allow governments the chance to decide where they want to insert a "notwithstanding clause", under section 33, to protect an offensive law from having to comply with the Charter: for instance, laws forbidding girls from participating in certain sports. For reasons not directly connected to issues of women's equality before the law, the government of Quebec has already passed legislation exempting all of its provincial laws from the application of the Charter.[8]

The onus is on Canadian women to ensure that government activity in this three-year period is constructive. One strategy is to conduct an organized review of legislation for compliance with sections 15 and 28, and at the end of that review to make recommendations to government officials and to legislative committees about which amendments to the legislation are required. This type of activity is called a "statute audit". For example, such an audit of federal and Ontario statutes of significance was begun in the summer of 1983 by the Charter of Rights Educational Fund, a private Ontario-based group of lawyers and lay people.

A second strategy, which arises from the statute audit process, is to consider bringing court cases and conducting other forms of legal action to test the meaning of section 15 once it comes into effect. This activity arises quite naturally from the audit process: the audits will reveal the areas where legislation violates Charter guarantees, and consideration can then be given to challenging the offending provisions in court.

The prospect of having a "litigation strategy" to help implement sections 15 and 28 of the Charter raises some important questions about how that strategy should be developed and carried out.

In this part of our study, the involvement of Canadian women in court cases and other forms of legal action are examined to see what lessons our history

may hold. Vignettes of Canadian women's involvement in law cases from the latter part of the nineteenth century are presented. Although we know that women have been involved in the law in many ways – by bringing or defending divorce petitions or custody actions, by launching wrongful dismissal actions when fired from a job or by initiating breach of contract actions when a commercial deal has gone awry – we have chosen not to present that aspect of women's legal history.

Rather, we try to focus on women who have been involved in the sort of case which might come forward in the future to test the meaning of the Charter. There is no set formula for identifying such a case. However, certain distinguishing features can be mentioned. For example, the case might focus on a highly significant aspect of constitutional law, private law (family property law), or criminal law. The case might have a potential impact on numerous women, either because the group directly involved is numerically very large (such as that in a big equal pay case), or because the point of law involved will set a precedent governing subsequent cases. As well, there might be a significant public dimension to the case, either for the reasons just mentioned, or because it relates to an important aspect of public policy.

We do not include a profile of every case which may qualify for inclusion under these very general criteria. Although we might have been able to offer a comprehensive list if we had limited our survey to cases before 1935, we could not, realistically, follow that approach for later years. With the increase in administrative tribunals since World War II, and the increasing caseload of the courts themselves, we were confronted with many examples from which to choose.

The cases we have selected show the wide variety of circumstances in which important issues can be raised. In some of these, individuals have acted alone, receiving financial help or moral support (or both) from groups. In others, groups of individuals have acted together, either in an **ad hoc** manner or through an established organization such as a union. As well, there is an astonishing variety of types of proceedings, ranging from matters taking place in a local magistrate's court to appeals to lofty institutions abroad, such as the United Nations. Where possible, we have tried to ascertain how the funds to finance the cases were raised, because the issue of finance has an important bearing on future strategy.

We hope that these cases provide at least a flavour of women's involvement in developing and testing the limits of the law. They show, as we will discuss at the end of the chapter, that Canadian women have much to be proud of. They also show, unfortunately, that women's efforts to date have been largely defensive and **ad hoc**. That we have achieved so much in such circumstances is praiseworthy; given different circumstances, of women's own choosing, future achievements might be even greater.

A. LANDMARK CASES IN CANADIAN WOMEN'S LEGAL HISTORY

Our survey starts with cases which deal with the fundamental issue of women's status under the Constitution. At one time, not long ago, women were denied the right to be lawyers, judges, or senators for the reason – which appears strange to the modern woman – that women were not legally "persons", and under our laws, only "persons" could exercise these rights. Beginning in the nineteenth century and continuing well into the twentieth century, women challenged this restriction, through the courts or in the legislatures, alone and in groups.

The first cases to attack this problem were those involving individual women wanting to practise law. When the courts interpreted the statutes of the day allowing "persons" to practise as meaning that women could not enter the profession, the battle shifted to the legislatures. Women fought for, and won, special legislation making it clear that women could be lawyers.

Finally in 1930, the important point that women were "persons" for the purpose of becoming a senator was recognized by the Judicial Committee of the Privy Council, the highest appeal court for Canada at that time, in the famous "Persons" case.

Here is the story.

1. Women Enter the Legal Profession

In 1897 Clara Brett Martin became the first woman called to practise law in Ontario and the Commonwealth.[9] The Law Society in Ontario had at first refused to let her train as a solicitor. It was only after the passage of the quaintly named **An Act to Provide for the Admission of Women to the Study and Practice of Law**[10] in 1892 that she was allowed to article – that is, undergo the period of apprenticeship for solicitors. Having had such a battle to become a solicitor, she had to go through the same process to become a barrister. She was finally called to the bar, but only after the passage of a second statute.[11] Here is how a male professional journal of the time greeted her call to the bar:

> We would . . . express the hope that she may be successful in the profession she has chosen. At the same time it will not be disloyal to her as now one of the brethren of the gown, also to express the hope that she may be the one brilliant exception to the time-honored rule which has hitherto closed our ranks to those who are not of the male persuasion.[12]

In 1902, Mabel Penery French applied for enrolment in the Barristers' Society of New Brunswick. The Society did not think that it had the power to let her become a member because she was not a "person" as that term was then interpreted in the statute governing the profession. As a result, the Society referred to the New Brunswick Supreme Court the question of whether her sex was a bar to admission. The Court did not accept the argument made by French's counsel that ". . . this is a case where the Court may decide upon what they conceive to be the real merits of the case irrespective of the authorities cited."[13] It held that the statute barred her application to become a member of the Society. French was admitted on April 16, 1906, after passage in the provincial legislature of **An Act to remove the Disability of Women so far as relates to the Study and Practice of the Law.**[14] Five years later, she applied for admission to the Law Society of British Columbia. Once again, she was required to take court action. Once again, a court rejected her claim that she was a "person" entitled to practise law.[15] Once again, the provincial legislature removed the legal obstacle to her becoming a barrister.[16] She was admitted to the bar in British Columbia on April 1, 1912.

Annie Macdonald Langstaff, a resident of the province of Quebec, was not so fortunate. In 1915, she petitioned the Quebec Superior Court after her application to take the preliminary bar examination was refused because of her sex. Mr. Justice Saint-Pierre, in refusing her petition, stated as follows:

> I would put within the range of possibilities though by no means a commendable one, the admission of a woman to the profession of solicitor or to that of **avoué**, but I hold that to admit a woman and more particularly a married woman as a **barrister**, that is to say, as a **person who pleads cases at the bar before judges or juries in open court and in the presence of the public**, would be nothing short of a direct infringement upon public order and a manifest violation of the law of good morals and public decency.
>
> Let us for a moment picture to ourselves a woman appearing as defending or prosecuting counsel in a case of rapt (sic) [rape] and putting to the complainant the questions which must of all necessity be asked in order to make proof of the acts which are of the essence of the crime or which are equally necessary to meet and repeal the charge.
>
> No woman possessing the least sense of decency could possibly do so without throwing a blur upon her own dignity and without bringing into utter contempt the honor and respect due to her sex.[17] (emphasis in original)

Langstaff's appeal to the Quebec Court of Appeal was unsuccessful.[18] She died, still unable to practise law, in 1926. It was not until 1941, after attempts by 13 other women to break the barrier, that legislation was finally passed allowing women to be called to the bar in Quebec.[19] In 1956, Quebec women also became eligible to be notaries.[20]

Women were admitted to the bar without resort to litigation in Manitoba[21] and Saskatchewan[22] (1915), Alberta (1917), Nova Scotia[23] (1918), Prince Edward Island (1926) and Newfoundland (1933).

The number of women in the legal profession has increased markedly in the past 10 years. In December 1983, the level of participation of women in the legal profession was as follows:[24]

	ALL PRACTISING LAWYERS	WOMEN PRACTISING LAWYERS		ALL ADMISSIONS IN 1983	WOMEN ADMITTED IN 1983	
Newfoundland	354	40	(11.3%)	21	5	(23.8%)
Nova Scotia	1,207	201	(16.7%)	126	19	(15.1%)
New Brunswick	614	–	–	62	24	(38.7%)
Prince Edward Island	100	16	(16.0%)	4	2	(50.0%)
Quebec	9,251	1,799	(19.4%)	641	280	(43.7%)
Ontario	16,236	2,279	(14.0%)	990	304	(30.7%)
Manitoba	1,403	157	(11.2%)	100	38	(38.0%)
Saskatchewan	1,027	162	(15.8%)	102	31	(30.4%)
Alberta	3,060	–	–	354	–	–
British Columbia	5,261	744	(14.1%)	392	112	(28.6%)
Northwest Territories	57	15	(26.3%)	8	3	(37.5%)
Yukon*	44	6	(13.6%)	3	0	–

* April 1, 1983 - March 31, 1984
– Statistics not gathered

On March 30, 1982, Madam Justice Bertha Wilson was sworn in as the first woman justice of the Supreme Court of Canada in its 107-year history.

2. The Persons Case

In 1919, the Federated Women's Institutes of Canada and the National Council of Women both asked the Canadian government to appoint a woman to the Senate.[25] Pressure in this direction mounted, and in 1921 the name of the well-known feminist and Edmonton magistrate Emily Murphy was put forward as the ideal appointee. The reply of the government was that it did not have the legal power to appoint women without an amendment to the **British North America Act, 1867**, because women were not "persons", and only qualified "persons" could be senators.

At the end of August 1927, five women activists from various parts of Canada – Emily Murphy, Nellie McClung, Louise McKinney, Irene Parlby and Henrietta Muir Edwards – sent a petition to Ottawa asking that the Cabinet direct the Supreme Court of Canada to decide the question of whether women could be called to the Senate. This involved having the Court decide whether the provisions of section 24 of the **British North America Act, 1867**, allowing the Governor General to "summon qualified Persons to the Senate . . ." permitted the appointment of women.

In 1928, the Supreme Court of Canada decided that women were not "persons" who could be summoned to sit as senators.[26] The women who had brought the case to the Supreme Court appealed its judgement to the Judicial Committee of the Privy Council in London, England, where a favourable ruling was secured on October 18, 1929.[27] Among the counsel for the women before the Supreme Court of Canada was Newton Wesley Rowell, K.C., leader of the official opposition in Ontario, who also represented the government of Alberta in the case. Rowell and Alberta Attorney General Lyndburn were counsel on the appeal to the Privy Council. Interestingly, the Canadian Department of Justice – which had successfully opposed the women's position before the Supreme Court of Canada – paid the costs of this appeal.

Twenty-one women have been appointed to the Senate since Carine Wilson, the first woman senator, took her seat in 1930. In February 1984, there were 82 men and 10 women in the Senate; that meant women held only 10.86 per cent of Senate seats.

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3. Indian Women as Persons

The cases in this part of the study deal with the efforts of Indian women since 1970 to gain recognition as full "Indian persons", with the same rights and status as male Indians. Since before Confederation, Indians in Canada have been subject to the successive statutes of the federal Parliament which regulate life on Indian reserves. The **Indian Act** now in force, in keeping with the long tradition, sets

out a complete set of regulations governing Indian life. They describe the organization of bands and where they are located, provide for the sharing of revenue from property held in trust for the various bands by the Department of Indian Affairs, and many other matters. The Act also sets out the qualifications for acquiring and retaining the status of being an "Indian" and the criteria used to determine what band an Indian belongs to.

These important rules for determining Indian status and band membership are different for men and women, and discriminatory against Indian women. They have been that way since 1869.

Subsection 12(1)(b) of the **Indian Act** provides that an Indian woman who marries a non-Indian man ceases to be an Indian within the meaning of the Act. A male Indian who marries a non-Indian does not lose his Indian status: in fact, he confers it on his wife.

The consequences of the loss of Indian status are severe. On marriage to a non-Indian, the woman must leave her parents' home and reserve. She may not own property on the reserve and must dispose of any she holds at the time of marriage. She may be prevented from inheriting property left to her by her parents. She cannot take any further part in band business. Her children are not recognized as Indian. Even if she separates, is divorced, or becomes widowed, she may be prevented from returning to live on the reserve with her family. Her body may not be buried on the reserve.[28]

The late Chief Justice Bora Laskin once called this treatment a "statutory excommunication" of Indian women from their society.[29]

This loss of status is not the only differentiation between men and women under the **Indian Act**, although it is the harshest. Two others are almost as grave. A woman loses her band membership if she marries an Indian of another band. Also, she is transferred to her husband's band regardless of her wishes. If she moves from a prosperous band to a poor band, she loses revenues which she may regard as her birthright. Even if a woman does not marry, any child she has may be

deprived of Indian status if the Registrar determines that the father is not an Indian.[30]

The Royal Commission on the Status of Women, established in 1967, received several briefs from Indian women, who had lost their status through marriage, asking for changes in the **Indian Act.**

From then on, numerous cases have drawn attention to the harsh consequences of subsection 12(1)(b) of the Act. The story of some women's attempts to challenge this subsection is told here. The first story, that of Jeannette Lavell and Yvonne Bédard, deals with the first time the provisions of the **Indian Act** affecting women were tested in the Supreme Court of Canada. The Court's decision upheld the provisions of subsection 12(1)(b) in the face of a challenge under the **Canadian Bill of Rights.** A different provision of the **Indian Act** was challenged under the **Canadian Bill of Rights** by Flora Canard, also unsuccessfully. Two other women whose stories we tell here, Mary Two-Axe Early and Sandra Lovelace, adopted somewhat different techniques to press home their points.

a) Jeannette Lavell and Yvonne Bédard

Jeannette Corbière Lavell was a member of the Wikwemikong Band of Indians in Ontario. In 1970, she married a non-Indian. As a result, her name and that of her child were automatically struck from the band list.

Yvonne Bédard was born a full-blooded Six Nations Indian. She married a non-Indian and had two children. After separating from her husband in 1970, Bédard returned to the Six Nations Reserve to live in a house which was left to her in her mother's will. Because she had married a non-Indian, the Six Nations Band Council ordered that Bédard's name be removed from the band list and that she and her two children leave her home and the reserve.

Both Lavell and Bédard challenged the decisions of their bands. They argued that these actions discriminated on the basis of sex, contrary to the **Canadian Bill of Rights,** because the provisions of the **Indian Act** depriving an Indian woman of Indian status when she married a non-Indian did not apply to Indian men.

The cases ultimately reached the Supreme Court of Canada and were heard together in 1973. The Supreme Court of Canada upheld the decisions depriving Lavell and Bédard of Indian status. The Court stated that the guarantee of "equality before the law" in the **Canadian Bill of Rights**, which had been relied on by the Indian women, meant only equality in the administration and enforcement of law.[31] The actual substance of the law could discriminate between men and women, as long as the law was applied by its administrators in an even-handed way. It was this ruling, so unpopular with Canadian women, which proved such an effective impetus to the women's lobby for better guarantees against sex discrimination in the **Canadian Charter of Rights and Freedoms.**

Lavell went on to become one of the founding members of the Ontario Native Women's Association, and has been its president for two terms, as well as being vice-president of the Native Women's Association of Canada.

The legal costs for Lavell and Bédard were paid by the Ontario Legal Aid Plan.[32]

b) Flora Canard

A second challenge to the **Indian Act** in the Supreme Court of Canada came in the case of Flora Canard, a native woman from Manitoba. The Court's decision adds yet another chapter to its conservative record in **Canadian Bill of Rights** cases.

Canard applied to the Court to be appointed administrator of her husband's estate following his death in 1969. The estate consisted of a house on the Fort Alexander Indian Reserve in which Canard was living. The Minister of Indian Affairs and Northern Development used his power under the **Indian Act** to appoint a Superintendent of the Reserve to administer the estate. Canard challenged this action. She argued that the **Indian Act** offended the **Canadian Bill of Rights** because women but not men were denied the right to be the administrator of a deceased spouse's estate.

In 1975 the Supreme Court of Canada held that the appointment of the Superintendent did not offend the guarantee of equality before the law under the **Canadian Bill of Rights.**[33]

Canard was represented by William Rachman, a Winnipeg lawyer, who donated his legal services. The Legal Aid Services Society of Manitoba paid a portion of the disbursements.[34]

c) Mary Two-Axe Early

Mary Two-Axe Early, Indian by birth, married a non-Indian. During her marriage, she returned two months every year to visit her reserve, Caughnawaga, near Montreal. Following her husband's death in 1968, she returned there to live in a house inherited from her grandparents. She was one of the women who presented a brief to the Royal Commission on the Status of Women[35] about the provision of the **Indian Act** affecting women, and in 1968 was a founder of an organization called Equal Rights for Indian Women.

The band council at Caughnawaga wanted to expel her from the reserve because of her loss of status at marriage. In 1975, while she was in Mexico City speaking at the International Women's Year Congress, the council attempted to evict her. However, Two-Axe Early enlisted the aid of Senator Thérèse Casgrain, the well-known Quebec feminist, to publicize her situation. Support from women's groups responding to Senator Casgrain's efforts forestalled the eviction. Two-Axe Early continues to live with her daughter, son-in-law and grandchildren on the reserve.

Senator Casgrain also obtained the services of a lawyer who was prepared to act without charge for Two-Axe Early. Her case, originally filed with the Superior Court of Quebec, has been transferred to the Federal Court of Canada. By early 1984, it had not yet come to trial.[36]

d) Sandra Lovelace

Sandra Lovelace is another native woman who married a non-Indian. When her marriage broke up, she returned with her son to her home on the Tobique Indian Reserve in New Brunswick. An application for housing to the Chief of the band was refused on the ground of her loss of Indian status at marriage. She and her son lived in a tent for part of 1977 until the weather turned colder. Later, they joined an occupation of the band office,[37] which was begun in September 1977 by a group of women on the Tobique Reserve to focus attention on the discrimination which non-status Indian women faced in their daily lives, particularly in the lack of housing.

The occupation lasted three months. It became clear that neither the federal government's policies nor the male-dominated organized Indian brotherhoods would respond to the problem. Dr. Noel A. Kinsella, chairperson of the New Brunswick Human Rights Commission, suggested that Lovelace petition the United Nations Human Rights Committee under the **Optional Protocol to the International Covenant on Civil and Political Rights**[38] for a declaration that the part of the **Indian Act** removing Indian status when a woman marries a non-Indian was contrary to the Covenant. This approach was a clever way of dealing with the reality that by 1977, the decisions of the Supreme Court of Canada in the **Lavell, Bédard** and **Canard** cases had made it virtually impossible to challenge subsection 12(1)(b) with success in a Canadian court.

The petition, prepared by the New Brunswick Human Rights Commission in consultation with Lovelace, was filed on December 29, 1977. The government of Canada finally responded in April 1980,[39] requesting that the United Nations Committee dismiss the petition and affirm the legitimacy of the **Indian Act**. On July 31, 1981, the United Nations Human Rights Committee found Canada to be in breach of Article 27 of the **International Covenant on Civil and Political Rights**,[40] relating to the rights of minorities. The Committee stated its view that protection of minority (Indian) rights did not require discrimination against one part of the minority. This decision was one of the factors behind a move by the federal government in 1981 to allow Indian Bands the option to ask that subsection 12(1)(b) not apply to their bands, so that women would have the same rights as men. To

date, however, the government has not repealed the section of the **Indian Act** creating the loss of status on marriage.

There are 577 Indian bands in Canada. By February 1984 only 95 of them had asked to be exempted from the provisions of subsection 12(1)(b).

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4. Reproductive Rights

Some of the most difficult issues for women and society are those relating to the capacity of women to bear children. Historically, society has restricted the autonomy of women in the interests of their children or potential children: reduced opportunities to work outside the home, and restrictions on the woman's personal liberty are two ways in which this societal interest has manifested itself. The potential for conflict between society's pressure and women's desire for autonomy and equality are obvious.

One area where the conflict emerges is that of employment. The traditional view of women puts "mothers" on a pedestal, or, some would say, in a cage, restricting their opportunities for employment outside the home in the name of the higher calling of motherhood. Even where the force of traditional views is diminished, the practical problems for women who increasingly are forced to combine paid employment and childbearing are numerous, including: availability of pregnancy leave and benefits; discrimination in hiring or promotion; differential treatment because of alleged hazards to the reproductive system; and availability and cost of child care.

We cannot deal with every aspect of these problems in this brief overview of legal action by women. Only a few stories can be told here to convey an idea of the variety of problems and strategies that exist.

The second major area where society exhibits its conflicting values is that of control of reproduction. Dissemination of birth control information has until comparatively recently been a criminal offence in Canada; in some circumstances,

abortion still is a criminal offence. The story of legal action by Canadian women would not be complete without an account of two controversial figures, Dorothea Palmer and Henry Morgentaler, and those who supported them.

We begin this section by considering the cases of two women, Gail Anderson and Janet Asselstine, who challenged restrictions on their right to work while pregnant. Next, the effect of the case of Stella Bliss on the provisions of the **Unemployment Insurance Act** relating to payment of benefits to a pregnant woman is examined. The section concludes with a note on Dorothea Palmer and Henry Morgentaler.

a) Gail Anderson and Janet Asselstine

Gail Anderson and Janet Asselstine, flight attendants for Pacific Western Airlines, both became pregnant in 1974. Each was required by their employer to take maternity leave without pay after her fourth month of pregnancy. The two women wished to work until their seventh month of pregnancy in order to qualify for unemployment insurance benefits. With the support of their union, the Canadian Airline Flight Attendants' Association (CALFA), the attendants filed a complaint with the federal Department of Labour under the provisions of the **Canada Labour Code.**[41] Under the Code, an employee who has completed 12 months' service cannot be dismissed or laid off solely because she is pregnant. The Department brought a prosecution on behalf of the women for violation of the provision.

The matter was heard in the Provincial Court of British Columbia. The Court was satisfied with the airline's argument that the maternity leave policy was based on the emergency and safety aspects of a flight attendant's duties. The Court held that the peculiarities of air transportation seemed to be incompatible with the physical and emotional problems of human reproduction. The charge against the airline was dismissed[42] and subsequent appeals of this decision were unsuccessful.

CALFA later began an action in the Supreme Court of British Columbia seeking to clarify the right of female attendants to work while pregnant. In a proceeding begun on February 16, 1978, CALFA sought declarations that flight

attendants could choose either the maternity benefits under their collective agreement with Pacific Western Airlines (which allowed an attendant to work until her confinement) or those contained in the **Canada Labour Code**. Both the Supreme Court of British Columbia and the Court of Appeal dismissed the union's action.[43]

In yet a third proceeding, CALFA laid a complaint against CP Air before the Canadian Human Rights Commission alleging that mandatory leave without pay after the thirteenth week of pregnancy was discrimination based on sex. The complaint was investigated and referred to a tribunal. On April 24, 1980, the union and CP Air agreed to settle the matter on the basis that the company would permit flight attendants to work until the end of the twenty-sixth week of pregnancy.[44]

b) Stella Bliss

The **Unemployment Insurance Act** was passed to guarantee continuity of income to those who lose their jobs under certain circumstances. In 1976, a Vancouver working woman, Stella Bliss, found that the protections of this Act were not available to her when she was fired by her employer because she was pregnant. Her case, which resulted in a decision of the Supreme Court of Canada, provided yet another significant inspiration to the women's lobby for improved Charter of Rights guarantees against sex discrimination.

Shortly after the birth of her child in 1976, Bliss, unemployed because her employer had fired her, applied for unemployment insurance benefits.[45] She was clearly capable of and available for work but was unable to find suitable employment. Given the length of time she had worked before being fired, she would have qualified for regular unemployment benefits. However, the Unemployment Insurance Commission disallowed her claim. They stated that Bliss, having been pregnant, could collect only pregnancy benefits provided for in the **Unemployment Insurance Act**, for which the qualifying period was longer than that required for ordinary benefits. Unfortunately, Bliss did not qualify for the longer period. She appealed the decision on the basis that the Commission's action, and the provisions of the **Unemployment Insurance Act** which allowed it, offended the guarantees of equality before the law in the **Canadian Bill of Rights**. As only women can become pregnant, she argued, provisions making it harder for pregnant people to get

unemployment insurance deny equality to women. This argument was successful before the "umpire" in the appeal process under the **Unemployment Insurance Act.** However, the government appealed to the Federal Court of Appeal, and Bliss was unsuccessful there.[46] She appealed to the Supreme Court of Canada.

The Supreme Court of Canada heard the case in 1978, and denied her appeal.[47] The Court held that Bliss was refused benefits, not because she was a woman, but because she had been pregnant. The Court adopted the reasoning of the Federal Court of Appeal that, in the circumstances, the discrimination arose not because of law, but because of nature.[48]

Bliss received legal assistance from the Vancouver Community Legal Assistance Society. Its staff lawyer, Allan MacLean, represented her on her successful appeal before the umpire. At the Federal Court of Appeal, MacLean was joined by Lynn Smith, a Vancouver lawyer. On appeal to the Supreme Court of Canada, Bliss was represented by MacLean, Smith, and John Nelligan, Q.C., a lawyer from Ottawa. The latter two donated their legal services; the disbursements were funded in part by the Public Interest Advocacy Resource Centre, a Vancouver-based public interest law group.

Pregnancy Leave Changes

In June 1983, the Parliament of Canada passed an Act to amend the Unemployment Insurance Act, 1971. The new Act changed the law under attack in the Bliss case. It repealed the section of the Unemployment Insurance Act, 1971, which required someone claiming pregnancy benefits to have been in the work force longer than someone claiming ordinary benefits. Under section 32, "Adoption", it also made benefits available to an adopting parent, male or female, for 17 weeks following placement in the home of the child to be adopted. However, a natural father still cannot claim benefits for any time off following the birth of his child.

In 1983, the Canadian Human Rights Act was also amended to provide that discrimination because of pregnancy is discrimination on a prohibited ground.[49]

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c) Dorothea Palmer

Until 1969, it was an offence under the **Criminal Code** to disseminate birth control information in Canada. The first major case to test the limits of that prohibition was that of Dorothea Palmer.

In the 1930's, the Parents' Information Bureau distributed information on birth control across Canada.[50] Some 50 nurses employed by the Bureau distributed this information, especially in areas of Canada where there were poor families with a large number of children. The Parents' Information Bureau was financed by Alvin Ratz Kaufman, a social reformer and philanthropist, and had its headquarters in Kitchener, Ontario.

Palmer, a nurse, worked for the Parents' Information Bureau in Eastview (now Vanier), a suburb of Ottawa. She was arrested in the fall of 1936 for selling contraceptive material contrary to the **Criminal Code.**[51] When it was pointed out that she was not selling but, in fact, giving information, the Crown was ready to withdraw the charge. However, Kaufman insisted that a trial be held, primarily so the law could be tested. Palmer was charged with unlawfully advertising birth control methods. Her trial lasted four months. The Parents' Information Bureau paid the fees of her lawyer, F.W. Wegenast, K.C., of Toronto. Many women testified at her trial, most of them in favour of the use of contraceptives.

Palmer was acquitted because of her successful demonstration that her actions had served the public good. The trial judge stated that, considering the economic circumstances of Eastview, it was indeed in the public interest to provide the town's poor with birth control information.[52] The Crown's appeal from the verdict was dismissed.[53] The Parents' Information Bureau distributed contraceptive information throughout Canada with little interruption afterwards, although the criminal law with respect to birth control information and advertising was not changed until the criminal law amendments in 1969.[54]

d) Henry Morgentaler

Dr. Henry Morgentaler was charged on August 29, 1973, with six counts of unlawfully procuring the miscarriage of a female person under section 251 of the **Criminal Code**. Morgentaler was found not guilty by a jury of citizens.[55] The Crown appealed the verdict. The judges of the Quebec Court of Appeal set aside the acquittal, entered a verdict of guilty and sent the case back to the trial court for the imposition of sentence.[56] Morgentaler appealed again. The Supreme Court of Canada dismissed the appeal, thus upholding the 18-month sentence imposed by the trial court.[57] Six organizations, including the Canadian Civil Liberties Association and the Foundation for Women in Crisis, submitted briefs during the argument before the Supreme Court of Canada.

While serving this first sentence, Morgentaler was brought to trial on a second charge of performing an illegal abortion. He was again acquitted by the jury.

Meanwhile, a strong public outcry had arisen in response to the Quebec Court of Appeal's action in reversing the jury acquittal on the first charge. The Court's action was seen as a repudiation of the jury system. In response to the serious concerns raised, the **Criminal Code** was amended so that a court of appeal could no longer substitute its own guilty verdict for a jury acquittal. The court can now uphold a jury acquittal or send the matter back for a new trial before a new jury.[58]

Relying on this amendment, the federal Minister of Justice set aside the guilty verdict against Morgentaler which the Quebec Court of Appeal had substituted on the first charge. The minister ordered that Morgentaler be re-tried on that same charge. This jury, too, acquitted Morgentaler, and he was released from prison, having served 10 months of his 18-month sentence. He had been tried and acquitted by juries three times, twice on the same charge.

After the election of the Parti Québécois government in Quebec in November 1976, all the outstanding charges against Morgentaler were dropped. The Quebec Minister of Justice advised Morgentaler that qualified physicians performing abortions under proper medical conditions would no longer be prosecuted in Quebec.

In 1978, the government also established family planning and fertility clinics within hospitals where abortions could be obtained, which came to be known as "Les Cliniques Lazure" after the Cabinet Minister, Dr. Denis Lazure, who had authorized them.

A legal defence fund, established in the name of Dr. Henry Morgentaler, raised approximately $75,000 from individuals and organizations across Canada. This money went toward the payment of Morgentaler's legal fees and other expenses relating to his trials and appeals.

Since Dr. Morgentaler was first charged, legal activity on the abortion issue has broadened to include not only the Crown and an accused, but an array of private individuals wanting to assert various interests, in various forums. The activity is too diverse to be fully chronicled here. However, there have been a few notable developments. For instance, the Nova Scotia Family Court appointed a guardian ad litem (that is, a legal representative) for a fetus of 18-weeks gestation, in a case involving a putative father who had sought an injunction to prevent a therapeutic abortion.[59] In another case, Ottawa resident David Dehler brought a court case seeking to represent all unborn children and to prohibit the Ottawa Civic Hospital from performing therapeutic abortions. Holding that Dehler did not have an individual right or any personal, proprietary or parental interest at stake, the High Court denied Dehler standing to raise the point.[60] However, in a third case, anti-abortion crusader Joseph Borowski was granted standing in 1981 by the Supreme Court of Canada to challenge the constitutional validity of the therapeutic abortion provision of the Criminal Code.[61] Trial of his action in the Court of Queen's Bench of Saskatchewan began on May 9, 1983; the court's subsequent decision that same year that the section is not unconstitutional was appealed by Borowski.[62] The opening of Dr. Morgentaler's clinics in Winnipeg and Toronto in 1983 attracted criminal charges. Morgentaler has challenged the provisions of the Criminal Code relating to abortion on the grounds that they offend the Charter of Rights.[63]

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5. Family Property Law

Disputes about who owns the matrimonial home or other property acquired during marriage are essentially "private" fights between husband and wife. Hundreds, if not thousands, of such disputes pass through lawyers' offices and courts at any given time. The outcome of these cases has a highly significant impact on the individuals involved and their families. Often, though, the cases do not involve what could be called a significant new point of law, or fundamental public issue, however moving or tragic the individual circumstances.

However, certain cases may indeed become the catalyst for significant and far-reaching developments in the law and law reform. So, although we cannot mention here in any detail the legal action taken by the thousands of Canadian women involved each year in family law cases, we can present one typical case. A ranch woman from Alberta, Irene Murdoch was involved in a claim to share in the family ranch that she and her husband had built up. The failure of that claim was a personal disappointment to her and became the inspiration for a major public movement for property law reform. Although scholars and law reform officials had been studying family property questions for some years before Murdoch's case gained public attention, and some reforms had already been made, the decision of the Supreme Court of Canada in her case inspired many women's groups across the country to take up the legal and political fight.

Murdoch was the wife of an Alberta rancher. On the breakdown of her marriage in 1968, Murdoch sought a share in the ranch property held solely in her husband's name. The ranch consisted of three quarter-sections of land, amounting to 480 acres in all. Her claim was based on her contribution to the building up of assets and the running of the ranch during 25 years of marriage.

At the trial, Murdoch answered the following questions concerning her activities in the ranch business:

Q. Could you tell the court, as briefly as you can, the nature of the work you did?

A. Haying, raking, swathing, moving, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything that was to be done. I worked outside with him, just as a man would, anything that was to be done.

Q. Was your husband away from these properties?

A. Yes, for five months every year.[64]

In spite of this enormous contribution to the running of the ranch, the trial judge found that Murdoch had done the work of "any ranch wife". This "routine" work did not justify a share in the property.

In 1973 the Supreme Court of Canada heard the case on an appeal from the Alberta courts. It denied her a share on the grounds that her contribution was no more than that of any other ranch wife and that it did not create any interest in the lands.[65]

Murdoch was represented throughout by Ernest Shymka of Calgary who agreed to take on her case on the basis that he would be paid out of the proceeds.[66] He was not paid for his legal services or for disbursements.

The Supreme Court of Canada ordered Murdoch to pay a portion of her husband's legal costs for the trial, the appeal at the Alberta Court of Appeal, and the appeal to the Supreme Court of Canada. Apparently, however, her husband did not enforce that order.[67]

In 1973, subsequent to the proceedings with respect to the division of family property, Mr. Murdoch petitioned for a divorce. Irene Murdoch counter-petitioned and sought maintenance for herself. In 1974, before his divorce was granted, Mr. Murdoch had transferred the ownership of two quarter-sections of the ranch land to his son, and then leased them back from him, in order to put this property beyond the reach of his wife. The Court held that this was not a **bona fide**

transaction and was done to hinder, delay, or defraud his wife's claim. The Court ordered that the conveyance be set aside.

Mr. Murdoch's assets were valued at $200,000. The Court ordered that he pay Irene Murdoch a lump sum for maintenance of $65,000 but that no monthly support payments need be made. The lump sum payment was chosen because it severed once and for all the relationship between the two and because it gave her a secure income for life, regardless of the future state of her husband's finances.[68]

While some law reform activity and study had taken place before the Supreme Court decision in Murdoch, the case triggered a new and intensive round of lobbying across Canada for family law reform. A wave of new statutes was passed in the common law jurisdictions which considerably improved the prior legislation. (see Table on next page)

B. OTHER FORUMS, OTHER STRATEGIES

Women have not restricted their strategies only to bringing cases to the courts. In the sections below, we describe the efforts of women to organize, both inside and outside the union context; the use by women of human rights complaints, with or without community organizing as an aid; and thirdly, the activities of women's groups in support of women involved in court proceedings (the particular cases we have chosen deal with violence against women). One of the major advantages of these types of collective action is the potential for addressing the problems of many women at the same time, as the examples in this section show.

1. Women Organizing

a) Unions

As the only organizations through which working people can place their concerns directly before employers, trade unions are an essential means of protecting and improving working conditions, including those of women workers.

PROVINCE/ TERRITORY	TITLE OF ACT	DATE OF PROCLAMATION
British Columbia	Family Relations Act (R.S.B.C. 1979, c. 121)	March 31, 1979
Alberta	The Matrimonial Property Act (R.S.A. 1980, c. M-9)	January 1, 1979
Saskatchewan	The Matrimonial Property Act (S.S. 1979, c. M-6.1)	January 1, 1980
Manitoba	The Marital Property Act (S.M. 1978, c. 24 (M-45))	October 15, 1978
Ontario	Family Law Reform Act (R.S.O. 1980, c. 152)	March 31, 1978
New Brunswick	Marital Property Act (S.N.B. 1980, c. M-1.1)	January 1, 1981
Nova Scotia	Matrimonial Property Act (S.N.S. 1980, c. 9)	October 1, 1980
Prince Edward Island	Family Law Reform Act (S.P.E.I. 1978, c. 6)	December 31, 1978
Newfoundland	The Matrimonial Property Act (S.N. 1979, c. 32)	July 1, 1980
Northwest Territories	Matrimonial Property Ordinances (sections 1, 2, 27, 28) (R.O.N.W.T. 1974, c. M-7)	July 1, 1974
Yukon	Matrimonial Property and Family Support Ordinances (O.Y.T. 1979 (2nd), c. 11)	January 1, 1980
Quebec	Revision of the family law provisions of the **Civil Code** of Quebec had been undertaken earlier; family law and matrimonial regimes were reformed in 1969,[69] partnership of acquests was introduced in 1970, paternal authority was abolished in 1977.[70] In 1980, a major reform of family law established the principle of spousal equality in marriage and within the family unit.[71]	

Unionization among women has doubled over the last 10 years and one million women in the labour force in 1981 were members of unions – 22 per cent of all employed women.[72]

Despite the rapid increase in the number of women union members, men still have a higher rate of unionization at 33 per cent of the male labour force.[73] Women also continue to be under-represented on the executive boards of unions: although 31 per cent of total union membership is female, women constitute only 16 per cent of board members.[74] Historically unions have been predominantly male organizations, and they are still responding to the massive entry of women into the labour force and the changes brought about by the women's movement.

For unorganized women wanting the protection of union membership, forming a union is not always easy. The first step is to apply for certification, the legal recognition which then requires the employer to bargain with the new union. Obtaining certification involves a legally determined process of signing up sufficient members and appearing before a Labour Relations Board which hears the application. It is the Board that decides who may belong to the union and whether to grant certification. Once established, the union begins to negotiate a first contract.[75]

In some instances the process is uncomplicated and the union will provide the technical expertise to guide the new local through the legal requirements. However, if the employer is strongly opposed to unionization, the steps to obtain certification and a first contract can become a lengthy, drawn-out battle. In recent years there have been several cases of women workers who have had to struggle long and hard in their attempts to gain union protection.

In the late 1970's, attempts to unionize bank workers, over 70 per cent of them women, were met with both employer opposition and legal barriers. The Canada Labour Relations Board had ruled in 1959 that a single branch of a bank was not an appropriate bargaining unit. The significance of this ruling was the implication that the whole nation-wide operation of a bank was the appropriate unit, and therefore that a majority of all workers across the country would have to be signed up in order to certify – an impossible task.

This ruling was contested in 1976 by the Service, Office and Retail Workers' Union of Canada (SORWUC), a small independent union in British Columbia formed specifically to organize women and deal with women's concerns.[76] SORWUC applied for certification of a single branch of the Canadian Imperial Bank of Commerce. After lengthy hearings of about a year, the Board finally ruled that a single branch was an appropriate bargaining unit and it seemed that union protection might at last become a reality for bank workers.

However, the banks proceeded to mount a coordinated, relentless and often sophisticated opposition to union campaigns among bank workers, and they have been successful. There are over 7,500 bank branches in Canada; only 56 are unionized.[77] Although the **Canada Labour Code**[78] prohibits the intimidation of workers attempting to unionize, banks were found to be guilty of violating the law on all the following points: denying promotion; transferring and firing staff for union activities; hiring additional workers to undermine the majority of union members required to form a union; holding individual and group meetings during working hours to pressure workers not to unionize; requiring only the workers at unionized branches to make up cash shortages out of their own pay; withholding pay increases from unionized workers only.[79]

Faced with such determined opposition, which undermined all efforts to obtain a first contract, and combined with mounting legal expenses and conflicts with other sectors of the labour movement, SORWUC decertified its locals in 1978 and withdrew from negotiations. Attempts to unionize bank workers in other parts of the country have not met with greater success.

A more successful unionization drive was undertaken by 75 women at Fleck Manufacturing Ltd., a small auto parts factory in Ontario. Once certified, conflict arose over the negotiation of a first contract. The employer refused to consider the union's proposals for a 35¢ per hour pay increase (the pay was minimum wage) and for provisions to ensure union security. Only after a five and a half month strike, extensive support from unions and the women's movement, and numerous legal battles, did the women win their union security clause and obtain a first contract. The solidarity and endurance of this small group of women workers

captured the admiration of many and demonstrated that women can be just as determined as men in pressing for their needs.[80]

Once a union is established, the struggles continue in negotiating improved pay and conditions of work. In recent years trade unions have increasingly turned their attention to issues of particular concern for women. One example is the struggle which has taken place over paid maternity leave.

In 1979 the Common Front unions in Quebec, bargaining for all provincial public sector workers, established a precedent in Canada by negotiating paid maternity leave. The agreement covered 20 per cent of all employed women in the province, and provided them with 95 per cent of their regular pay for 20 weeks of maternity leave.

This achievement was not repeated until 1981 when the Canadian Union of Postal Workers obtained 17 weeks of paid maternity leave. The Treasury Board of the federal government had previously rejected such proposals, and only capitulated after a six-week strike by the postal workers. Since that time, the clerical and regulatory group, translators, home economists and historical researchers of the federal government have negotiated the same arrangements without resort to a strike.[81]

Unions differ in their willingness and ability to take up and negotiate issues which will improve the working conditions of women. However, a trend towards recognizing women's concerns has been well established and the rewards of women's involvement in trade unions are starting to be reaped.

b) Ad Hoc Organizing

Unions are not the only organized avenue for change that women have used. Women have also found that by organizing when necessary around a particular issue they can have an impact. One notable example is the case of the Newfoundland squid-jiggers.

Women have always been involved in the seasonal work of the squid fishery on the Twillingate Islands in Newfoundland. They work on their husbands' boats or dry squid on shore. Working in those capacities, however, has never entitled the women to unemployment insurance benefits once that seasonal employment comes to an end. They are entitled only if they are independent, self-employed squid-jiggers.

In 1978, the squid came in unprecedented numbers. The men fished for cod by day and the women jigged for squid at night. The women cleaned and dried squid and sold them as a processed product. They paid unemployment insurance premiums from their earnings.

Late in the fall, the men and women who had worked in the squid fishery applied for unemployment insurance benefits. Most of the men received their benefits but most of the 250 women claimants did not. Two exceptions to that rule were women whose first names – Georgie and Frankie – sounded male. Not surprisingly, the women who were refused benefits became suspicious. It appeared that the local authorities administering the **Unemployment Insurance Act** did not believe that the women had jigged the squid they processed. They thought that the women had bought it from others or had helped process their husbands' catches.[82]

The women started to tell their story to the media in Newfoundland, and women's groups – particularly the Corner Brook Status of Women Council – joined the fray to help the squid-jiggers organize. Two of the most active women came to Ottawa in March of 1979 to attend the annual conference of the National Action Committee on the Status of Women (NAC). NAC and the local fishermen's union paid their airfares; the women raised the rest of their travel expenses from within their own community through bake sales and door-to-door canvassing. As a result of meetings held on Parliament Hill with Newfoundland Members of Parliament, the Minister of Employment and Immigration and the Minister of National Revenue, their claims were finally processed by the regional office of the Unemployment Insurance Commission. Not all the claimants were successful; some appealed the denial of benefits and all but one were successful.[83]

2. Human Rights Commissions

Apart from unions and **ad hoc** organizations, women can take advantage of an important mechanism to widen the definition of their rights: the human rights commission. Since 1970, most provinces and the federal government have passed legislation to define human rights and to set up bodies to enforce them. One of the chief purposes of this legislation is to prohibit specific kinds of discrimination. Discrimination on the basis of sex is prohibited under all such legislation. Women quickly learned to make use of the new laws. For example, in 1983 the Quebec Human Rights Commission reported that the single leading cause of complaints was discrimination on the basis of sex.

Any individual can bring a complaint to a human rights commission in a case directly affecting them. In many jurisdictions, those not directly affected can bring a complaint on behalf of someone who is. This type of complaint, called a "third party" complaint, is usually allowed to go ahead only if the person on whose behalf it is made gives his or her consent.

This third party complaint mechanism is a good way for a concerned organization to shoulder, for its members, some of the work of bringing a complaint. Our first example deals with a direct complaint; the others illustrate third party complaints.

a) The Jamaican Women Case

This case involved seven women from Jamaica admitted to Canada in 1973 and 1974 to work as domestics. They had been given entry to Canada under the terms of an arrangement for recruiting Jamaican domestics reached between the Jamaican Ministry of Labour and the Canadian Department of Manpower and Immigration. The arrangement provided, in part, that the women must be between 18 and 40 years of age and "single, widowed, divorced, without minor children or the encumbrance of common law relationships and the issue thereof." After the seven women had lived in Canada for a number of years, deportation proceedings were instituted against them under the **Immigration Act**[84] on the ground that when they had applied to come here, they had failed to disclose that they had dependent

children under the age of 18. According to government officials, this non-disclosure meant that they had come into Canada by providing false and misleading information. The women maintained that they had been advised what to say by officials of their own government and alleged that the deportation moves were racially motivated.

On March 1, 1978, the women filed a complaint with the Canadian Human Rights Commission (CHRC).[85] Their attempts to challenge the deportation orders had been unsuccessful before the Immigration Appeal Board and the Federal Court of Canada, and the orders were outstanding. Their complaint to CHRC alleged that they were being deported as the result of discrimination based on race, national or ethnic origin and sex.

The case raised the important issue of whether the Commission under the **Immigration Act** has the power to challenge the actions of a government department acting under a federal statute. The Federal Court of Canada ruled against the women and CHRC on this point. (However, because of section 15 of the **Canadian Charter of Rights and Freedoms**, governments will now be subject to the principle that individuals are equal before and under the law without regard to race or sex.)

The plight of the Jamaican women received much popular sympathy because they had been in Canada for so long that it had come to seem like home to them, and because their statements at the time they entered Canada seemed relatively innocent.

The women applied to the Federal Court of Canada for an injunction to restrain enforcement of the deportation order pending the result of the complaint to CHRC. Both the Federal Court Trial Division[86] and Federal Court of Appeal[87] refused to grant the injunction. The women were deported but were allowed to re-enter Canada some six months later on permits from the Minister of Employment and Immigration and were to be given landed immigrant status.

b) Women at Canadian National Railways

Since 1978, Action-Travail des femmes, a Montreal-based organization which works for the elimination of discrimination against women in the work force, has encouraged women to apply for positions at Canadian National (CN). Women have been denied entry to certain jobs (upholstering, welding, carpentry) by CN which argued that they did not have the necessary skills as compared to skilled male applicants. Some of the entry-level jobs for which the women applied did not require the skills that were cited by the employer, although the jobs to which employees could subsequently be promoted did have such requirements.

In 1979, a two-pronged attack on this problem of discrimination was launched before CHRC. Action-Travail des femmes filed a third party complaint with the Commission. As well, seven individual women filed complaints. The complaint of Action-Travail des femmes alleged that "systemic" discrimination was being practised by CN.

Systemic discrimination is discrimination which occurs as a secondary by-product of a system which is designed without any evil intention. Treating some groups exactly the same way as other groups may, for instance, effectively deny them access to jobs or facilities. Systemic discrimination is non-intentional, "blind" discrimination, usually arising when a system which looks even-handed on the surface is applied to persons or groups of persons with different characteristics. For example, a requirement that job applicants have followed a particular course of study at a particular school may appear even-handed on the surface; however, if it is learned that the course was for many years open only to men, one's view of the requirement would change. The determination of whether discrimination is present in such cases is made on the basis of the impact or outcome of the practice complained of, not its intention.

In December 1980, the individual complaints were settled by conciliation, which is the first step of the commission process. The seven women received sums totalling nearly $80,000 and offers of jobs satisfactory to themselves and to CN.

Attempts at conciliation of the third party complaint failed. The Commission moved to the next stage of its process, establishing a tribunal to adjudicate the complaint. CHRC usually represents both itself and the complainant before tribunals, with a potential saving in the legal costs for the complainant. However, Action-Travail des femmes did not want to be represented by the Commission because it did not agree with the Commission's positions on the issues. So, it retained its own lawyer, Hélène Lebel, and paid the expenses involved in appearing before the tribunal. By February 1984, a decision had not been reached.[88]

c) Equal Pay for Work of Equal Value

In 1979, the Public Service Alliance of Canada (PSAC) lodged a complaint with CHRC on behalf of the women in the general service category employed by the government of Canada. This category contains food service, laundry and miscellaneous personal service workers who are predominantly female, as well as custodians, protective personnel, and messenger, building and store service workers who are predominantly male. Two thirds of the workers in the whole category are women. The complaint alleged that the women were being paid less than the men for work of equal value.

The work of the predominantly female employee groups was compared by the Commission to that of the predominantly male employee groups, and it was decided to proceed to appoint a tribunal to adjudicate the issue.

In November 1981, even before the tribunal hearing started, the Treasury Board paid $17 million in compensation to about 2,300 female employees. The average individual settlement was $5,000. The government agreed to phase in a single pay scale for the various groups over three years.

d) Prison for Women

In 1981, Women for Justice, a group of Ottawa women, filed a third party complaint with CHRC concerning the treatment of women inmates in federal penitentiaries. The complaint asserts that the women inmates had been discriminated against on the basis of sex.

At the end of 1981, only 104 of the 9,104 people in federal prisons were women.[89] (A small number were held in provincial institutions but only if the province had an agreement with the federal government.) Most of the women incarcerated in the federal system were sent to the Prison for Women in Kingston, Ontario – the one federal institution which houses women. Many of the women were far from their families. Although male inmates had the option of being transferred to a prison closer to home (there were 35 prisons for men in various parts of Canada), women had no such choice. They also had fewer options than men had in rehabilitation, job retraining programs and work programs. For example, hair-dressing was the only vocational program available when the complaint was lodged, although later data processing was being added to the curriculum.

CHRC made a preliminary finding of discrimination on December 14, 1981.[90] It appointed a conciliator to attempt to reach a settlement satisfactory to the parties. By February 1984, conciliation was continuing.

3. Groups in Support of Women in Court

The issue of violence against women, at home and outside the home, has received increasing attention in the past few years. Reform of the criminal law in the area of sexual assault, and an increasingly critical focus on depictions of violence against women in the media are two of the many ways in which the concern over violence has been manifested. The activities of many women's groups, from the network of Rape Crisis Centres to the various **ad hoc** groups protesting particular events or developments, have contributed to an increased public awareness.

When an individual woman is involved in a court case or other proceeding dealing with violence against women, it is usually in the role of victim. She is isolated and vulnerable. She may still feel intimidated by the aggressor and fear reprisals.

In sexual assault cases, the woman must overcome two stereotypes which may affect the outcome of her case. One is the tendency to blame the victim for

whatever happened. The second stereotype – a corollary to the first – is the tendency to give the man the benefit of the doubt, which goes beyond the obligatory presumption of innocence which the law affords to any accused.

The following two cases will illustrate how support by women's organizations can provide immediate help and encouragement to the victims throughout the difficult trial proceedings. Regardless of the outcome of cases, the organizations have been successful in attracting media attention to the plight of the women. However, it is the long-term results of these activities which have proved to be the most significant. Important reforms in both the substance and the administration of the law have been made because women's organizations have been successful in attracting public sympathy for victims of violence.

These two cases illustrate how, thanks to women's groups, the treatment of women by the courts has become the focus of extremely sympathetic public attention. The first story, that of George Pappajohn, also shows the development of a new way for a court to give the benefit of the doubt to an accused man, whereas the second case, that of His Honour Judge Albert Bewley, reflects in addition the tendency to blame the victim.

a) The Pappajohn Case

On August 4, 1976, a saleswoman from a real estate firm in Vancouver met George Pappajohn, a prominent businessman, in a restaurant for lunch to discuss the sale of his house. Following the lunch, they went to inspect the house. What followed has been bitterly disputed by the two parties, resulting ultimately in the Supreme Court of Canada accepting the woman's account.

The woman stated that Pappajohn grabbed her, pushed her into the bedroom and undressed her. She protested, screamed and tried to escape. Her hands were tied behind her back and she was gagged and raped. Finally, she managed to escape and fled from the house naked, with her hands still tied behind her back. She ran down an alley and pounded on the door of a nearby house, which was opened by a priest. She was extremely upset, exhibited great fear and emotional stress, and insisted that she did not consent to any act of intercourse.

In contrast, Pappajohn stated that the woman was a willing participant in several acts of sexual intercourse. He admitted tying and gagging the woman, but said that it was done as an act of bondage to stimulate sexual activity. When the woman protested, he desisted from any further efforts at intercourse and none occurred after the protest.

After trial before a jury, Pappajohn was convicted of rape. He appealed the conviction, first to the British Columbia Court of Appeal,[91] where he was unsuccessful, and then to the Supreme Court of Canada. The question on appeal was whether the trial judge had erred in failing to instruct the jury to consider as a defence the argument that Pappajohn had a mistaken but honest belief that the woman had consented to intercourse.

The Supreme Court of Canada did accept the principle that a mistaken but honest belief in consent could be a defence to a charge of rape. However, it found that there was no evidence which would support the argument that Pappajohn had such a belief. At the trial, the jury had believed the woman about her lack of consent. Pappajohn's appeal was therefore not successful before the Supreme Court of Canada,[92] but it did confirm as part of the law of Canada a principle that many regarded as placing an extra hurdle in the path of someone who has been sexually assaulted.

Following the incident, the real estate agent had contacted Rape Relief in Vancouver, an organization which provides counselling and legal advocacy for female victims of rape and sexual assault. Rape Relief gave her support and encouragement during the difficult court proceedings and sat with her during the trial. In addition, it made certain the trial received plenty of publicity. Each day, Vancouver women and members of women's organizations sat and observed the trial. In the face of the widespread media coverage, their presence was a reminder that women were watching the outcome of the case.[93]

The final decision by the Supreme Court of Canada was bitterly criticized by feminists because it enshrined in the law what men often wanted to believe: that a woman's refusal to consent to sexual acts could be ignored and that their own aggression was socially acceptable. The Pappajohn decision fuelled the

lobbying for legal reform. In January 1983, new provisions of the **Criminal Code** came into effect which severely restricted the use of the defence of mistaken but honest belief as to consent.[94]

b) Comments from the Bench

On August 25, 1977, the case of a 21-year-old man who was accused of unlawfully confining an 18-year-old woman came to trial in Provincial Court in Vancouver. His Honour Judge Albert Bewley presided over the trial. The accused allegedly went to a house with a knife in his hand, broke down a door, ripped the telephone off the wall, and forceably seized the woman. Prior to this incident he had been convicted of a similar offence and he was still on probation when these events occurred. The trial judge found the accused guilty of the offence and sentenced him to prison for six months.[95]

During the trial, Judge Bewley made the following comments about the young woman and her friends:

> There is a girl here, or a couple of girls, young nubile females, who've been around a little bit, eh? They've travelled from Ontario to here, they're a free floating type of female, young for their age, very nubile, very attractive, surely, but I suppose, basically I have to look at it this way, still impressionable, still stupid . . . you know, women don't get much brains before they're thirty anyway, Mr. Rhodes, but at the age of eighteen or so, they make some stupid mistakes, mostly because we males who know better, lead them into it.
>
> Mr. Rhodes, look, I understand the picture perfectly. We've got some silly, stupid seventeen, eighteen year old girls, they're on their own from back in Ontario. They meet up with him and I guess they all think they're swingers or some damn thing. He's got a macho personality obviously and he comes in, he's going to talk to this girl, he's going to get her to talk to him one way or another, he had a knife in his hand and he's going to show her, you know, and she's willing to go along with him. I found him technically guilty of unlawful confinement, you know, but I'm not too sympathetic towards these stupid girls. There's no big deal, right? It isn't as if he held up a —— as in the other case, where, he may have held up an innocent driver, getting away from something or threatened a Policeman with a knife or something. He's

> demonstrating his manhood to a little girl eighteen years of age who's probably half inclined to think he's a man by showing a knife, so big deal, eh?
>
> So I could give him five years but I don't think under the circumstances of this case, I'd be entitled to give him five years because as we clearly have said before, he got mixed up with a silly, little bunch of girls who mean well, they got scared because he was proving himself a macho man, was going to haul one of them out and talk to her even if she got scared and ran into the bedroom, so we've got a bunch of clucking females running around and they're all so scared that they have to call the Police.[96]

The Crown appealed the sentence given the accused. The Court of Appeal said that the sentence was far too lenient and imposed a sentence of one year determinate and two years less one day indeterminate.[97]

Judge Bewley's comments may well have passed unnoticed were it not for the fact that the transcript of the trial came to the attention of some British Columbia women's groups. After reading the transcript of the trial which was prepared for the appeal, the British Columbia Federation of Women, the Service, Office and Retail Workers' Union of Canada, and the Vancouver Status of Women filed a complaint with the Chief Judge of the Provincial Court of British Columbia concerning the sexist comments made by Judge Bewley and requested his dismissal. The complaint was investigated and an inquiry into the allegations was held by the Judicial Council of British Columbia.

Lynn Smith, a Vancouver lawyer, was retained as counsel by the three women's groups. They sought standing in order to introduce evidence, cross-examine witnesses, and make submissions to the inquiry on behalf of the young women victims. Counsel to the Judicial Council was A. McEachern, who became Chief Justice of British Columbia in 1979. Judge Bewley was also represented by counsel, Mary Southin. Standing was denied to the three women's groups, and this decision was upheld in the court of appeal.[98]

The complaint against Judge Bewley was dismissed and he remained a judge. The inquiry held that there was not sufficient evidence in his remarks of bias against women in general. Certain expressions were found to be off colour and in

bad taste. An observation made by Judge Bewley that even if the accused had stabbed the woman it would not be any loss to society was found to be improper. The inquiry expressed its disappointment at the inability of an experienced judge to express himself with more care.[99]

Actions such as these, although not immediately successful, have made Canadian judges increasingly aware of a woman's perspective on the legal system. In addition, many women feel less and less hesitant to denounce what they feel may be unsympathetic treatment by the courts.

C. CONCLUSION

As we review the numerous cases above, we note with some pride that Canadian women, individually and collectively, have been taking action for decades to defend or secure their legal rights and interests. Canadian women have a good history on which to build a strategy for utilizing the **Canadian Charter of Rights and Freedoms.**

It is not a coincidence that the cases surveyed here fall into two distinct historical periods. The first period, which stretches from the end of the nineteenth century until the late 1930's, corresponds to the first phase of the Canadian women's movement, a time when energies were directed to attacking the visible barriers which excluded women from public life. Feminists in this period spent much of their efforts in winning formal rights such as the right to vote, to enter the professions and to sit in the Senate. The Canadian women's movement of this era saw formal rights as a necessary prerequisite to women's fuller participation in public affairs. A more active role for women in public life meant the possibility of introducing the social reforms which the movement championed and which were to form the basis of the modern Canadian welfare state.

The second historical period represented by these cases begins in the late 1960's and continues on at least into the mid-1980's, when the equality rights clause of the Charter will come into force. In fact, the bulk of the cases fall into this later period which corresponds to the rise and continuing influence of the modern feminist

movement, often dubbed "women's liberation". The goals of this movement, as they emerged, were much more comprehensive than those of the earlier movement. The new feminism aimed at nothing less than a restructuring of society, where the complete equality of women and men in both the private and public spheres would do away with traditional sexual stereotypes about what a woman's and a man's place should be. The **Report of the Royal Commission on the Status of Women in Canada** in 1970 set forth an agenda for change over the following years.

Not surprisingly, the cases which belong to this later period represent a wide range of issues. Yet, when examined closely, most of them in fact deal with the growing desire of women to be autonomous and economically self-sufficient. Whether it be the right to continue paid work during pregnancy, to receive benefits during the temporary unemployment caused by childbirth, to gain access to the same better-paid jobs as male workers, or to have a share of a family home or business after years of labour, the cases which came forth in the 1970's reflect an increasing consciousness of the importance to women of ensuring their economic autonomy. It is in this period that Indian women began to contest a rule which often forced them to opt between marriage to the man of their choice and relinquishing their heritage, a rule based on a presumption of the economic and social dependence of women on men.

Finally, one theme runs continuously through both periods. It is the theme of women's desire to control the circumstances of their own childbearing. From Dorothea Palmer, who distributed contraceptives in a working-class neighbourhood in the 1930's; to Stella Bliss, who refused to accept that although able to work she was disentitled to unemployment insurance benefits because of pregnancy; to the thousands of women in Quebec and elsewhere in Canada who supported Dr. Henry Morgentaler in his attempt to make medical abortions more widely available, we see that the issue of reproductive rights is of continuing importance to women.

In most of the cases involving women, the supporting of women, or the vindication of issues of importance to women, the persons concerned have been forced to act in order to defend themselves. In some cases, they have been charged with a criminal offence, for example Dorothea Palmer or Henry Morgentaler. In

such cases people have little option as to whether or not to act. In other cases, the government has acted by withdrawing or refusing a needed benefit: Stella Bliss and the squid-jigging women of Newfoundland were in this position.

In all these cases, and indeed in almost all the cases surveyed above, the women had little choice but to act, however slender their resources or reluctant their wills. To have refrained from acting would have produced serious consequences. Yet these women, and those who helped them, were required to take up the cudgels at a time they did not choose, and they were dealing with issues they might well not have raised had they been given the choice. Their position was almost entirely reactive, responding to issues and challenges set by others.

In only a few of the cases we have looked at did women themselves choose the issue, the forum and the timing of their legal contest, in order to advance their rights or prove a point. The "Persons Case" is perhaps the most famous of these instances.

The question of whether women are defending or attacking when involved in legal proceedings has important ramifications. Considerable financial cost may be involved in the proceedings. As a rule, proceedings are lengthy, with those involved exposed to the tension, uncertainty and strain for years. One important conclusion drawn from the case survey is that women are better able to marshal their resources, and be prepared psychologically and financially, when they choose the issue and the forum for their planned legal offence. Women can choose to act in cases which present the best opportunity, from a legal point of view, for obtaining a precedent of value on a significant matter.

On April 17, 1985, section 15 of the **Canadian Charter of Rights and Freedoms** will come into force, three years after the rest of the Charter took effect. The experience after the other sections of the Charter came into effect in April 1982 showed that the sceptics, who predicted a quiet beginning and little real reliance on the Charter, were wrong. There have been hundreds of cases in which Charter arguments have been made, often with success, and the provincial superior courts have rendered a number of important decisions on the Charter. The first cases were heard by the Supreme Court of Canada in the spring of 1984. It is

expected that section 15 of the Charter will be relied upon frequently in the weeks and months immediately following April 17, 1985, and in the years to follow.

Will the pattern of action by Canadian women, as outlined in the first part of this chapter, prove to be an effective way of contributing to the development of a body of rights under section 15 of the Charter?

As we have noted, the cases surveyed usually involved individual women who were required to act in order to defend themselves or to challenge some withdrawal of a right or benefit. Moreover, the history of "women's" cases has been episodic; there is no evidence of a long-term strategy in choosing cases to litigate, in funding cases, and in working for the systematic development of a particular doctrine or rights in a specific area.

This is not to say that these cases were handled in a disorganized way. Indeed, there is ample evidence of considerable organization – in the publicity, the funding, and in the legal presentation of the case itself. However, the development and elaboration of rights through a concerted litigation strategy has not characterized the efforts to date. This is not surprising. The **Canadian Bill of Rights,** 1960, did not provide an inspiring framework within which to contemplate a coherent program of change through litigation. Its status as an ordinary piece of legislation, its limited application to matters within federal jurisdiction, and the restrictive interpretation it received in the Supreme Court of Canada, all made the **Canadian Bill of Rights** an unlikely vehicle for achieving change.

The frailty of the **Canadian Bill of Rights** may well be the reason why we do not now have in our jurisprudence a well-articulated theory (or theories) of equality rights, and why, in our view, courts are not yet comfortable with arguments based on equality principles.

On the other hand, there has been some success, particularly at the level of boards of inquiry, in advancing sex discrimination arguments within the context of human rights codes. Here again, however, the fact that the human rights commissions favour mediation over open hearings, and do not accord a large measure of control over strategy and procedure to complainants and their counsel,

has meant that the codes have not provided the best context for development of a coherent litigation-based strategy for equality rights.

The organized "women's movement" of Canada has, for all this, demonstrated that sustained efforts to win legal change are both desired and underway, albeit not particularly in the context of litigation. The focus of the drive for equality in Canada to date has been at the political rather than the judicial level. The efforts to ensure adequate protection for women's rights in the Charter are a recent and outstanding example of the lobbying skills of Canadian women; the temperance movement, the drive for women's suffrage, efforts to secure improved conditions for women and children in the workplace, and the family law reform movement, are earlier examples. Many women's organizations have ongoing and issue-oriented lobbies which maintain links with officials and elected politicians on a wide range of issues. Indeed, the years since the **Report of the Royal Commission on the Status of Women in Canada** have witnessed the establishment of one federal and six provincial status of women councils. These advisory bodies were created by governments themselves to perform an internal lobbying and advising function as well as to do research and make public information on issues of particular concern to women.

It is significant that until the coming into force of the **Canadian Charter of Rights and Freedoms** in 1982, the Canadian legal system rested on the pillar of the doctrine of parliamentary supremacy. Briefly, and with some significant exceptions, this doctrine has meant that the legislature is the ultimate authority, courts having the power to "interpret" legislative intention but not explicitly to overrule it. With the advent of the Charter, even Parliament and the legislatures become subject to its principles (with the exception of those principles they choose to "override"). In a system predicated on the doctrine of parliamentary supremacy, with its focus on the ultimate authority of the legislature, it is natural that the equality strategies of Canadian women have had a parliamentary focus, with court cases arising, not as part of an overall strategy, but on an **ad hoc** basis, as the exigencies of individual women's lives required.

On the threshold of implementation of the equality rights section of the Charter, it is worth examining the option of developing an organized, goal-oriented

approach to litigating Charter issues. Material which we think will assist that examination has been included in the next chapters of this book.

We first consider some of the practical aspects of bringing a case to court, and look at other resources in the community which exist to assist in the resolution of legal problems. Obviously anyone considering devoting resources to a litigation strategy for Canadian women would not want to duplicate resources available elsewhere.

Chapter II
GETTING TO COURT

The cases reviewed in Chapter I not only outlined results which were important for women's rights, but also described how cases got to court and how the legal expenses for the court cases were paid. In order to appreciate the time and financial commitment made by the women in those cases, it may be helpful to understand what is involved in a civil litigation case.

Some of the cases which were reviewed, such as **Lavell**, **Bliss**, and **Murdoch**, used the conventional litigation process. Accordingly, we will outline in this chapter how to start a legal proceeding, who has the right to sue, what are the steps in a legal action before the trial, what is an appeal, and what are the costs to finance the process.

Not all the cases in Chapter I were conducted in a conventional manner. For example, the five women activists in the "Persons" case petitioned the Cabinet to refer the constitutional question of whether women were persons directly to the Supreme Court of Canada. On the other hand, Sandra Lovelace referred the question of whether she was an Indian person to a committee of the United Nations which used international law to determine the answer. Dorothea Palmer's rights were decided by the criminal justice system. Finally, many of the cases did not even take place in a traditional courtroom.

As women look to litigation as a means of enforcing their rights under the **Canadian Charter of Rights and Freedoms**, it is important to look at the present resources available to women to assist them in conducting litigation and in paying for the costs. Given the substantial commitment of resources required to launch even one case, let alone a planned series of cases, anyone considering establishing a fund would be well advised not to duplicate the resources already available.

A. TRIAL OF AN ACTION

One way to test the validity of a specific piece of legislation or the action of a government under the Charter is to commence an action in the appropriate court.[1] The person instituting the action is usually referred to as the plaintiff; the person who replies is the defendant. In some provinces, the first step in an action is to issue a Writ of Summons which is a command from the Queen to the defendant to answer the complaint. The plaintiff then prepares a Statement of Claim which outlines her complaint and the facts on which she intends to rely. In other provinces, the first step is the Statement of Claim. The defendant prepares a Statement of Defence to answer the allegations and the plaintiff has an opportunity to reply to issues raised in the Statement of Defence. These pleadings establish what is at issue between the parties.

Each side is required to inform the other party about the documents it possesses which relate to the case. Each party is given the opportunity to question the other side concerning their case and the examination is recorded. This step is called discovery. Once these steps are complete, the case is set down for trial. It usually takes at least one year from the commencement of proceedings to complete this production and discovery phase and reach the trial stage.

If the remedy sought from the court is a declaration that the legislation is discriminatory and therefore invalid, a person may choose a shortened procedure called a petition or notice of motion. In such cases, there may not be any pleadings or discoveries unless ordered by the court. Evidence is presented by a sworn statement called an affidavit. The parties are referred to as "applicant" and "respondent".

At a trial, each party is entitled to call witnesses who give evidence under oath. Witnesses may be cross-examined. At the conclusion of the case, the lawyers for the parties make submissions on the facts and law involved in the case. The decision of the court is contained in a judgement which binds the parties.

An unsuccessful party may appeal to a higher court. For example, an appeal from a Superior Court judgement would be brought to the Court of Appeal

and would be heard six to twelve months after the date of the judgement, depending upon court calendars.

If the case is of major importance, a further appeal may be brought to the Supreme Court of Canada. It is necessary to obtain leave of that court, that is, the court must agree to hear the case; the application for leave takes approximately three months. If leave to appeal is granted, the case will be heard by the Supreme Court of Canada nine to twelve months later.

It is not hard to see from this sketch of a trial that a substantial commitment of time is required. Accordingly, continuing support for the women involved in the case, as well as the ability to make a sustained commitment of time and money, are two of the features of a legal action fund which would prove essential.

B. STATUS TO SUE

1. Standing

The term "standing" means the right to institute an action and to have it heard by the proper court or administrative tribunal. Standing is a vitally important issue in legal cases and questions of standing may arise in two contexts. First, there are cases between persons arising out of factual and legal disputes between them. Divorce cases, wrongful dismissal actions against employers, and cases dealing with damages suffered in motor vehicle accidents are examples. If a person has a private financial or property interest in the outcome of a case then that person will be granted standing and will be allowed to participate in the conduct of the case. For example, in a divorce action involving custody, both parents have standing and the court may grant standing to a lawyer representing the children whose custody is in dispute. If a car hits a pedestrian, both the driver of the car and the pedestrian will have standing in an action for damages arising out of the accident. A person who saw the accident will not be granted standing because the courts take the position that it is none of her or his business who was at fault.

The second type of standing involves proceedings dealing with conflicts between a person and the government. A woman may be complaining about some government action that directly affects her such as government expropriation of her farm or denial of a tax deduction. She will have standing to proceed.

On the other hand, a woman may want to proceed against the government to protect or vindicate a generally available right – for example, the right to an abortion. In such cases, the courts traditionally have not granted standing unless the following tests can be met:

(1) she can show that the statute is intended to give her a special benefit or protection which has been violated; or

(2) the interference with a public right is also an interference with her private right; or

(3) although no private right is affected, she can show some special damage or interest beyond that of the general public.

Courts and administrative tribunals limit the number of persons who may present cases to them for several policy reasons. First, unless a dispute affects the person directly, it has been regarded as none of her business. Second, the barrier of standing is used to prevent the courts from becoming overloaded. Third, standing rules as to who can challenge government action indirectly limit the amount of judicial interference in government activities.

If a woman lacks standing in her own right to commence proceedings to enforce a public right, she may seek the assistance of the Attorney General who represents the government department responsible for enforcing the law in its jurisdiction. She may ask the Attorney General to sue to enforce the law. The Attorney General may refuse. She may then ask the Attorney General if she might sue on its behalf. This type of proceeding, used in common law jurisdictions, is called a "relator action". The citizen bears the costs of this proceeding. Again, the Attorney General may refuse. If the Attorney General refuses to sue, or refuses to permit her to sue on its behalf, she cannot go to court to insist that the Attorney

General act. As a practical matter the Attorney General is not neutral but is a member of the government whose legislation the person is seeking to challenge.

Recently, the traditional test for the granting of standing in order to challenge legislation has been broadened in a series of cases examined by the Supreme Court of Canada. In 1978, Joseph Borowski, a former Manitoba cabinet minister and anti-abortion activist, sought a declaration that the provisions of the **Criminal Code** concerning therapeutic abortions were contrary to the **Canadian Bill of Rights** and were therefore invalid. He had no personal, financial or property interest in the outcome of the case – for example, his wife was not seeking an abortion against his wishes. When he began an action to ask the Court of Queen's Bench for Saskatchewan if the legislation was valid, the question arose as to his standing. The Supreme Court of Canada ultimately found that Borowski had standing because he was able to show that "he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the court."[2] This decision, brought down in 1981, may have a considerable impact when women begin to challenge in courts the validity of legislation on the basis of the **Canadian Charter of Rights and Freedoms**.

Apart from the courts, women's groups may also seek standing before those tribunals which decide rights affecting women, such as labour relations boards, human rights tribunals and immigration appeal boards. Generally, administrative tribunals are generous in granting standing to interested persons. Standing is granted depending upon the wording of the statute which establishes the tribunal, the purpose of the statute and the hearing, whether the organization has a contribution to make to the hearing, and whether the group and its members will be affected by the outcome.

Although it now appears to be easier under the **Borowski** test to acquire standing when challenging legislation or government action, in court or in an administrative hearing, it may still be advisable for a women's group to persuade someone who is directly affected by the offending legislation to launch the challenge in her name in order to avoid the expensive and frustrating experience of losing a case on the issue of standing. If the case is lost on the issue of standing

alone, the court will never reach the merits of the case. In spite of the fact that the traditional test for standing has been widened, a defendant may still challenge a plaintiff's right to sue. Even if the plaintiff is ultimately successful, the issue of standing in that case, if challenged, must be litigated, which will take time and money.

2. Class Actions

In the United States many civil rights and sex discrimination cases are brought as class action suits. This means that one or more persons who have a cause of action against a defendant may bring a civil action on behalf of other persons who have similar grievances against the same defendant – even though each individual is not named specifically. If the representative plaintiff is successful against the defendant, the defendant must pay damages not only to the plaintiff, but also to all the members in the class. Class actions are used extensively in the United States, but have limited application and results in Canada.

The rules of practice in each province (except Quebec) and territory are similar in content to the Ontario rules which provide that: "where there are numerous persons having the same interest, one or more may sue. . . for the benefit of all."[3] This being the only reference in the rules to the availability of class action, the courts have not been receptive to such suits. In 1983 the Supreme Court of Canada deemed the Ontario provision too vague and inadequate to act as a base for a representative class action except in very particular circumstances.[4] This ruling demonstrated that the courts will be unwilling to allow class actions until the provincial legislatures stipulate clearly and precisely the procedure to be followed.

In Quebec, new procedures for class actions were established in 1978.[5] A class action cannot be instituted without the prior authorization of the court. According to the **Code of Civil Procedure of Quebec**,[6] the court may authorize the class action if:

(1) the recourses of the members raise identical, similar or related questions of law or fact;

(2) the facts alleged seem to justify the conclusions sought;

(3) the composition of the group makes it difficult or impractical to require that various plaintiffs join their individual lawsuits together;

(4) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

If authorization is given, the court will describe the class whose members will be bound by any judgement, identify the common questions and relief sought, and order the publication of a notice to class members. A member of the class may ask to be excluded from the class and such a member is not bound by the judgement obtained by the class. The court supervises the conduct of a class action.

Quebec also has a special fund which assists the financing of class actions.[7] As of February 1984 there had been 113 applications for class actions in Quebec. Of those, 32 were granted, 43 were denied; the balance were either pending or discontinued. While these statistics demonstrate that the Quebec courts restrict the number of class action suits by not granting them authorization, of 11 decisions rendered on the merits, six of the actions were successful while four others were settled affirmatively out of court.[8]

In Quebec the class action has become one means of establishing legal rights. The statistics demonstrate that once a class has been authorized by a court, the plaintiffs have a reasonable chance of success. The success of these class actions is definitely beneficial to the interests of any group wishing to establish a legal right.

Although legislative reforms are being proposed in the other provinces,[9] Quebec is the only province which specifically authorizes class actions. To date, because of the time and expense involved in establishing the viability of a class combined with a lack of clarity in the area of women's legal rights, women are advised to avoid this procedure.

3. Amicus Curiae and Intervenors

There may be cases in which women are neither plaintiff nor defendant, but in which issues affecting women have arisen. Individual women, groups of women or women's organizations may wish to participate either in the presentation of the case or in the legal argument to ensure that the position of women on the issues has been fairly placed before the court. A person who is not a party to a dispute, but who wishes to intervene in a proceeding to provide assistance to the court by presenting arguments on the issues in dispute, is described as an **amicus curiae**, or "friend of the court". As there is no right to intervene, permission of the court must be obtained in each case. Some courts have specific rules governing interventions; others do not.

Although the practice of intervention is widespread in the United States, especially at the Supreme Court level, it is much less frequent in Canada. One of the first interventions in Canada was made in 1945 by the Canadian Jewish Congress in **Re Drummond Wren.**[10] In that case, the court declared that a clause in a contract which provided that a piece of land was "not to be sold to Jews or persons of objectionable nationality" was unenforceable. The lawyer for the Canadian Jewish Congress appeared as **amicus curiae** with the consent of the applicant, Wren, and made oral submissions to the court to support Wren's position against the clause.

Rule 60 of the **Rules of the Supreme Court of Canada**[11] governs interventions before the Supreme Court of Canada. Any person who is interested in an appeal between the parties may apply to the Court for leave to intervene. The judge hearing the application will set forth the terms and conditions of the appearance. This was the procedure which allowed many intervenors in **Attorney General of Canada v. Lavell and Bédard**[12] and **Morgentaler v. The Queen.**[13]

There are no rules permitting interventions before the Federal Court of Appeal. In **Re Canadian Human Rights Commission and Eldorado Nuclear Limited,**[14] the party who brought the complaint to the commission sought to intervene on the appeal. Although not granted status as an intervenor, the complainant was permitted to be present at the appeal, to file written argument, and to make oral submissions.

The Canadian Civil Liberties Association (CCLA) sought leave to intervene as **amicus curiae** at the hearing of **Re Clark et al. and Attorney General of Canada,** a case in which members of the Progressive Conservative Party brought an application to challenge the laws of secrecy of information relating to certain uranium transactions. The Chief Justice of the High Court of Ontario denied the CCLA application on the grounds that the issues raised were fully covered in the statements filed by the parties so that the submissions of the intervenor relative to the same issues would serve no useful purpose. The Court did not consider it necessary or proper to widen the issues which the parties were proposing to present to the Court. The Court held that "interventions **amici curiae** should be restricted to those cases in which the Court is clearly in need of assistance because there is a failure to present the issues (as, for example, where one side of the argument has not been presented to the court). Where the intervention would only serve to widen the **lis** [the issue in dispute] between the parties or introduce a new cause of action, the intervention should not be allowed."[15]

In general, a person wishing to intervene in an appeal or in proceedings for judicial review of government action prepares a Notice of Motion, which is returnable on the hearing date, and files the material which will be relied on. The intervenor may want to present to the court facts in addition to those produced by the parties. For example, in **Morgentaler v. The Queen,**[16] a survey on the availability of abortions in Canada was presented to the Supreme Court of Canada in an affidavit sworn by an officer of CCLA. A name frequently applied to such material or research presented by an intervenor is the "Brandeis brief". The term originated in the United States in 1907 with the National Consumers' League when their lawyer, Louis D. Brandeis, presented to the Supreme Court a brief consisting of a collection of statutes, reports of committees, statistics, reports of commissioners of hygiene and inspectors of factories to support his case for the enforcement of minimum standards for employment of women.[17] A Brandeis brief has been described as "[T]he marshaling of scientific or quasi-scientific facts, which are outside the legislative history and the lower court record, in order to document a legal argument. . . ."[18] This technique has been widely developed in the United States but to date has been used infrequently in Canadian courts.

With the enactment of the Charter, the courts will face more complex legal issues. There may be compelling interests other than those raised by the litigants. The rights of individuals and minorities will not necessarily be protected by the Attorney General which acts as the lawyer for the government. The Supreme Court of Canada has signalled in **Borowski**[19] that a wide class of persons will be granted standing to challenge legislation. On the other hand, it does not necessarily follow that a similar standard will be used by the court to permit interventions by interested persons. For example, the Saskatchewan trial court judge in the **Borowski** action refused to permit the Canadian Civil Liberties Association, the Canadian Abortion Rights Action League and various anti-abortion organizations to participate in the trial.[20]

C. FINANCING LITIGATION

The cases surveyed in the first chapter show a variety of methods of raising or providing the funds required to finance the litigation. Private subscription, fundraising, donation of legal services, legal aid, and even government paying the bill directly, have all been featured. A common thread to all the cases is the real importance of legal expenses when undertaking litigation. It is expensive to use litigation as a tool to effect legal change. We should all bear in mind a Nova Scotia case in which Cape Breton landowners who sought a court order to prohibit aerial spraying by forestry companies not only lost the case, but were ordered by the court to pay the legal expenses of the forestry companies in the case and to pay any damages the companies may have suffered as a result of the landowners bringing the suit.[21]

1. Legal Expenses

It is critical to estimate the likely expense before a person embarks on litigation, and so it is reasonable and proper to ask the lawyer for an estimate of legal expenses. The expense of litigation consists of two parts: legal fees and disbursements. Legal fees are normally charged on an hourly rate for each hour of legal services provided. Average hourly rates in 1984 range from $60 to $150 and more, depending upon the expertise of the lawyer and the difficulty of the case.

The person will have to pay all out-of-pocket expenses of the litigation, referred to as disbursements. For example, there are court expenses to institute an action, to serve a party, for the transcripts of the proceedings and the examination for discovery, witness fees (including fees for experts), travel expenses, photocopying, and so on.

The usual practice is to ask the client to pay a portion of the legal fees and disbursements before work is begun. This money, called a retainer, is placed in the lawyer's trust account and held there for the benefit of the client. Most lawyers send interim bills as the case proceeds and funds are taken from the trust account to pay the interim bill. More money may be requested as the funds held in trust are depleted.

The client must pay to assemble evidence for the trial. It is expected that some litigation concerning women's issues under the Charter will require the calling of such expert witnesses as economists, actuaries and statisticians. In addition, a party may need a survey to establish patterns of discrimination. These expenses will be substantial and must be paid for by the client.

It is difficult to forecast legal expenses. An estimate of the fees for a five-day trial in 1984 would be 100 hours of pre-trial preparation at the approximate hourly rate plus a counsel fee of approximately $1,500 or more for each day of trial, plus disbursements.

In order to appeal a trial decision to the Court of Appeal, it is necessary to have a transcript of the proceedings. In 1984, the cost of a transcript was $400 for each day of trial. The fees for an appeal from a five-day trial would be in the range of $4,000 to $6,000. A successful party could expect to collect a portion of those fees as taxed costs. It is estimated that it would cost approximately $1,500 to seek leave to appeal to the Supreme Court of Canada. The costs of the appeal itself could range from $4,000 to $6,000.

A woman involved in litigation should expect to pay the legal expenses of an action out of her own pocket. In most provinces, the court in its judgement may award "costs" to the winning party. These costs will include some fees, and

disbursements calculated on a court-approved scale or tariff. The successful party's account, or bill of costs, is reviewed or "taxed" by a court official. The successful party will not, however, recover all of her costs because the court-approved scale of costs covers only a portion of the actual expenses incurred. That portion varies from province to province. The losing party will have to pay her own legal expenses plus the taxed costs of the winning party. If the point of law is new and the parties have acted reasonably throughout the conduct of the case, the court may make no order as to costs, leaving each party to bear all her own costs. However, the usual rule is that the successful party is awarded her costs payable by the losing party. A person who is successful on an appeal will usually be awarded her taxed costs of both the appeal and the first proceeding, no matter what had been the outcome of the first proceeding.

2. Sources of Funds

It is clear that if women choose litigation as a strategy for social change, they must also be prepared to finance the expense of such a strategy. As the previous section illustrates, legal expenses will be high and individual women plaintiffs may be unable or unwilling to bear the total expenses of their case. As a result, women will have to look for sources of money for litigation. One route is to look for private funding – to finance litigation costs from individuals, groups of women, or foundations. The second route is to seek public funding – from unions, from government sources such as legal aid and to use government agencies or tribunals such as human rights commissions or employment standards offices or to seek government grants. Neither the private nor the public route is entirely satisfactory and both routes have their drawbacks in terms of availability of funds and confusion over who directs and controls the case. We will first look at the problems and limitations of relying on private funds.

3. Contingency Fees

Lawyers are sometimes prepared to undertake a case on a "contingent" or speculative basis. A contingency fee arrangement is an agreement between lawyer and client, made before the proceedings are begun, which provides that the lawyer's compensation for services rendered will be a set percentage of the

judgement recovered. Usually, the client is responsible for all disbursements. Conversely, the lawyer agrees to demand no fee if the litigation is not successful.

If a woman does not have the money to pay for legal services, a contingency arrangement is one way of deferring legal expenses until the case is over. In British Columbia, Alberta, Manitoba, Northwest Territories, Quebec, New Brunswick and Nova Scotia, this sort of arrangement is permitted,[22] subject to certain controls. In the other provinces, lawyers are forbidden to enter into such arrangements.

Contingency fee arrangements are generally reserved for claims by motor vehicle accident victims where the potential dollar recovery is large. Since the outcome of women's litigation under the Charter is at present uncertain and unlikely to produce large damage amounts, the contingency fee arrangements, even in those provinces which permit them, are an unlikely source of legal services.

4. Champerty and Maintenance

A second problem which might arise for private funding of litigation in the common law provinces is what is known as champerty and maintenance. "Maintenance" is defined as the giving of financial assistance or encouragement to one of the parties of a lawsuit by a person who has neither any interest in the action nor any other motive recognized by law as justifying the interference. "Champerty" is a type of maintenance which involves the supplying of financial assistance in return for a promise of a share in the proceeds of the action. The rules in our legal system against champerty and maintenance were developed to prevent the stirring up, or financing, of litigation on the part of those with no legitimate interest in such litigation.

Persons wishing to assist women to bring and defend cases, or organizations wishing to devote some of their funds to such purposes, will have to safeguard their efforts from offending these common law principles relating to champerty and maintenance. Champerty is not a real concern, because there is no danger of breaching the common law prohibition against champerty unless the

organization providing the funds for women's litigation seeks a share of the proceeds of the action.

The question of maintenance poses a more difficult problem. There is no longer any criminal penalty in Canada for maintenance or champerty.[23] However, anyone in a common law province who has suffered special damage because of the wrongful giving of financial aid can bring a lawsuit for damages against the person assisted (and the source of assistance).[24] The most obvious person to bring such a lawsuit would be the defendant in the lawsuit if the plaintiff were financially assisted. This is a real difficulty as the second lawsuit for maintenance could effectively cancel out the benefit of the original financial aid.

The key to whether financial support for litigation would be regarded as maintenance is the nature of the donor's interest in the action. Over the past century, the concept of what amounts to a legitimate interest has been greatly widened. Today, support of legal proceedings, based on community interest, mutual protection or religious or social principles, will not likely invite a successful lawsuit for maintenance.[25] For instance, a court found that there was no maintenance when an association, formed by the owners of land along a river and of the fishermen who used the river, brought a lawsuit against a company which had polluted the river.[26] Similarly, a trade union may assist a member to bring a claim for wages against an employer or may help a union official to launch a libel suit if the lawsuit were connected with union activities.[27] Charity, as a special sort of community interest, will also justify financial assistance for litigation. A person giving financial assistance to a poor person need only have a **bona fide** belief in the justice of the cause, and need not have made full inquiry into the legal content of the case.[28] What is regarded as "poverty" does vary with the circumstances of the case.[29] However, in litigating cases concerning women's rights, it is unlikely that a plaintiff or her donor would face a successful claim for maintenance from a defendant.

The principles of champerty and maintenance were never introduced into Quebec law. However, the code of ethics of the Quebec Bar prevents lawyers from fomenting law suits for their own advantage where none would otherwise exist.

5. Charitable Status

A group or individual trying to raise money for litigation costs might consider whether they would be likely to receive larger donations from more donors if the donations could be deducted from the donor's taxable income. Setting up a legal action fund as a charitable organization – donations to which qualify as deductions for donors – may appear to be an attractive option, but there are pitfalls in qualifying for such a status.

Under the **Income Tax Act** (Canada), organizations which operate for "charitable" purposes may apply to the Department of National Revenue to be a "registered charity".[30] Registered charities are exempt from taxation and donations to such charities are tax deductible.

In common law, an organization is considered to be "charitable" if it is operated for the purpose of relieving poverty, advancing religion or education, or engaging in any endeavour beneficial to the community as a whole in a way which is charitable.[31] Although such an organization need not be incorporated, it may be if it so wishes.

Some special interest groups have established a charitable organization as a legal entity separate and apart from the original organization. The Canadian Environmental Law Research Foundation, the educational arm of the Canadian Environmental Law Association, is one example. The Canadian Civil Liberties Foundation has recently been established as an offshoot of the Canadian Civil Liberties Association. The charitable organization usually undertakes public education functions, while the "mother" organization concentrates on advocacy before government bodies and courts. Historically, there has always been some question as to what extent a charitable organization can undertake political activity.[32] In an information circular issued by the Department of National Revenue in early 1978, the Department set out its views on what constitutes political objects and political activities (which it would not permit for registered charities):

> . . . An **object** normally is said to be "political" if its ultimate intention is to influence the policy-making process (as opposed to the administrative process) of any level of government, viz, federal, provincial or municipal . . . An **activity** is considered political if it is designed to embarrass or otherwise induce a government to take a stand, change a policy or enact legislation for a purpose particular to the organization carrying on the activity.[33] (emphasis added)

In the circular, specific activities such as lobbying, the presentation of briefs, and the mailing of form letters were discussed. However, the circular did not discuss whether a registered charity might contribute financial resources to the cost of pursuing legal remedies before courts or tribunals.

The circular, which generated much public scrutiny and comment because of its stringency, has been withdrawn. The questions, however, remain. Can a charitable organization contribute to the costs of litigation? Does it make a difference whether the organization is a party to or participant in the proceedings or merely a financial contributor to a party or participant? What other activities of a charitable organization might be unacceptable even if litigation is acceptable? Certainly, an organization which secures charitable status opens itself up to potential scrutiny of its activities by government officials.

Apart from the vagueness surrounding the acceptable role of a charitable organization, there is another important matter to be considered. Women's income, on average, is less than 60 per cent of men's income in Canada and therefore, the advantages of a charitable tax deduction are not readily apparent for most women donors. The importance of this element may depend on who the targeted donors are likely to be – mostly women, mostly men, rich women, rich men, corporations, or a mix.

In short, charitable status may or may not be a worthwhile goal for a group undertaking or supporting legal advocacy. It is a question that must be studied carefully before any decision is made about the nature and structure of a legal action fund.

D. ASSISTANCE AVAILABLE FROM GOVERNMENT AGENCIES, TRIBUNALS AND UNIONS

The second route of funding for litigating women's issues is public funding, that is, using assistance available from government, agencies and tribunals and from unions. Although we might agree with the adage (updated for our purposes) that "each woman is entitled to her day in court", it represents an oversimplification about our legal system. Not every complaint is brought forward by the individual or group affected. In our criminal justice system, the state has an interest in protecting the physical safety and property of its citizens and it may initiate and prosecute breaches of our laws.

Furthermore, not every civil case is heard first (if at all) before a court. Governments have taken an increasingly active role in protecting our civil rights by setting standards and establishing dispute resolution mechanisms to enforce compliance with these standards. Federal and provincial statutes, for instance, prohibit certain kinds of discrimination and establish minimum standards for the workplace. Unions, which are also regulated by statute, have developed procedures for resolving the complaints of workers. Most of these services are provided to women without charge.

Finally, governments have recognized that often there is a gap between the cost of legal representation and an individual's ability to pay. Governments now contribute to the cost of legal representation in some proceedings through legal aid programs.

Unfortunately, public assistance will not provide a complete answer to the problems of litigating women's issues. Although public assistance may provide a low-cost route to the individual plaintiff, there are a number of problems with this funding alternative. For example, many legal issues are not covered by public assistance, and there are problems of delay and a lack of control of the legal process. As a result, the outcomes are not always satisfactory to the individual nor to women in general.

1. Legal Aid

Legal aid is a form of government assistance used by many women to finance their litigation. For example, the **Lavell and Bédard,**[34] **Canard,**[35] and Jamaican women[36] cases discussed in Chapter I were all funded in whole or in part by legal aid. Since women earn less than men, women are less able to hire a private lawyer and more women are eligible for legal aid than men. However, there are many problems with the legal aid system. First, legal aid is not available for all issues women may wish to litigate. Second, the fees paid by legal aid to lawyers handling such cases are so low that many lawyers are unable or unwilling to participate in the program. Finally, in today's climate of restraint, government funds to legal aid are being curtailed and legal aid's response has been to stiffen the requirements for financial eligibility and to decrease the numbers and types of legal cases covered.

In the past, legal aid was provided to needy persons on a charity basis. The provision of legal assistance has now been institutionalized in all the provinces and territories and legal aid is available for a limited range of cases to persons who are financially eligible.

Legal aid is administered by the provinces and is funded on a cost-sharing basis with the federal government. The first legal aid plan was established in Ontario in 1951;[37] the latest plan was established in November 1979 by the **Legal Services Ordinance** of the Northwest Territories.[38]

In determining whether an applicant qualifies for legal aid, the income and often the assets of the applicant and the type of legal problem are considered. If an applicant qualifies, the provincial plan will pay the lawyer's fees and disbursements or will provide the legal services directly through a clinic.

The **first consideration** is income. Legal aid will be given to those who would be unable to retain a lawyer or who would suffer serious hardship if they had to obtain legal services on their own. Many provinces administer a means test to examine the income, disposable assets, indebtedness, maintenance obligations and other expenses of the applicant to determine if that person could afford to retain a

lawyer without contracting major debts or having to sell modest assets necessary for her livelihood. The guidelines for the test vary from province to province. In some provinces, the eligible level of income is that which would entitle the applicant to social assistance in the province or an income level that would be reduced to below the level for social assistance by the cost of legal services.

The legal aid plan may require the applicant to enter into an agreement to repay part of the costs of the lawsuit. The applicant may also be obliged to give a lien on his or her house as security for the legal expenses. In Manitoba, there is a user fee of $35 which may be waived.

If the applicant is financially eligible, the **second consideration** is the type of legal problem, be it criminal or civil. In criminal proceedings legal aid will be given to a person charged with a serious criminal offence. For other types of criminal offences, for example minor theft, the granting of legal aid is discretionary. Generally, legal aid will be available if conviction might result in the imprisonment or loss of livelihood of the applicant.

In civil proceedings, the types of cases for which legal aid is given vary widely from province to province. A civil proceeding is any legal matter other than a criminal case and includes court proceedings, administrative tribunal hearings, bankruptcy proceedings, drafting documents, negotiating settlements and appeals. Saskatchewan excludes cases which might result in a monetary award from which legal fees could be paid. Newfoundland, Quebec, Ontario, Manitoba and British Columbia exclude cases involving breach of promise of marriage, alienation of affections, actions relating to defamation, criminal conversation, election proceedings, preparation of wills, settling of estates, and small claims court actions. In Alberta, the availability of legal aid for civil matters is very limited. It is not given for small claims court matters, consumer problems, or divorce, unless there are urgent and compelling reasons. In all provinces, legal aid for appeals is totally at the discretion of the plan. If a person is refused legal aid, each province has a procedure to appeal the refusal and to request a rehearing.

There are two ways that legal services are provided under legal aid plans in Canada: using lawyers in private practice ("judicare") or using staff lawyers in

law centres. In New Brunswick, Ontario, Alberta, the Yukon and the Northwest Territories, legal aid is based on the "judicare" or private bar model. Under this model, an applicant who receives a legal aid certificate may use any lawyer in that province who will accept the case. The lawyer then bills the plan for services rendered and is reimbursed according to a fee schedule prescribed by the plan. In some of these provinces, including Ontario, clinics with staff lawyers are also operated to serve specific client groups, for example, by legal issue or geographical location.

The other model is to provide staff lawyers. Prince Edward Island, Nova Scotia and Saskatchewan provide legal services through lawyers who are on staff with the plan. In certain circumstances, for example if the crime is very serious, the person will be referred to a lawyer in private practice.

Legal aid services in Newfoundland, Quebec, Manitoba and British Columbia are provided by a mix of the judicare and staff lawyer models.

As previously mentioned, women earn less than men and so are more likely to use legal aid to finance their litigation. Generally, women can find knowledgeable lawyers who accept legal aid cases in family or matrimonial law. In all other types of cases, finding a lawyer willing to represent a woman may prove to be more difficult. Increasingly, in all types of cases, lawyers are becoming reluctant to accept legal aid cases because the fee schedule is inadequate, there are delays in receipt of payment and the plans have time-consuming administrative and procedural requirements. As a result, in complicated or unusual cases, a woman may have difficulty finding an experienced lawyer willing to accept the case. As well, eligibility for legal aid, which has always been restricted, is being reviewed further in some provinces because of the perceived need to cut government budgets. Given the income level of women in Canada, these cutbacks will have a disproportionate effect on women.

These legal aid plans were developed before the Charter came into effect. Each provincial plan must consider the extent to which it will support litigation under the Charter which might not fall within existing eligibility criteria.

Even with its problems, legal aid remains a potential source of funds for litigating women's issues under the Charter.

2. Human Rights Commissions

Human rights commissions have been one of the few forums available to women where they might litigate the issue of equality. In general, human rights officers have been receptive to well-founded complaints of sexual discrimination and women have been the beneficiaries of positive legal interpretations on equality made by human rights boards and tribunals, including orders for reinstatement in their jobs, compensation and changes in company policies and practices (including implementation of affirmative action programs). Nevertheless, there are serious flaws in the present system of adjudicating human rights complaints. Women complain of lengthy time delays, forced conciliation, lack of control over the process and low compensation awards. Until the enactment of section 15 of the Charter in April 1985, a complaint to the appropriate human rights commission is the only route which women can take with a complaint of discrimination.[39]

The federal government and each province in Canada have enacted legislation to protect human rights within their respective jurisdictions. The aim of these acts is to declare the existence of human rights in Canada, to encourage compliance through public education, and to discourage and eliminate discrimination through enforcement and prosecutions. To accomplish these aims, 11 human rights commissions have been established (one in each province and one at the national level).[40] In the Yukon[41] and the Northwest Territories, human rights are enforced through the Territorial Commissioner.[42] Each commission has a different legislative mandate and therefore reference to the specific statute is advisable.

It is possible to make some generalizations about prohibited grounds and procedure. The **Constitution Act, 1867**,[43] divides legislative power between the federal and provincial governments, and this division of power has a bearing on the jurisdiction of the human rights commissions.

The Canadian Human Rights Commission has jurisdiction to deal with complaints about matters within federal jurisdiction, i.e., with respect to federal

Crown corporations, federal undertakings such as railways, airlines, banks, or communication networks. Each provincial commission has jurisdiction over complaints which arise in that province, except for matters which fall within federal jurisdiction. Most complaints which arise fall within provincial jurisdiction.

The rights protected vary from province to province. Generally, discrimination is unlawful with respect to:

(1) accommodation, services or facilities offered to the public;

(2) occupancy of commercial unit or housing accommodation;

(3) employment; or

(4) membership in a union, a professional or trade association;

if that discrimination has been based on race, national or ethnic origin, colour, religion, age, sex or marital status. There is no uniformity of protection from jurisdiction to jurisdiction; for instance, equal pay for work of equal value is included only federally and in Quebec.

Generally, the only way to enforce a breach of human rights codes is to initiate a complaint with the appropriate human rights commission. A victim of this type of discrimination cannot seek redress for the discrimination through a lawsuit.[44] In Quebec, however, a complainant may sue directly in the courts for breach of a human right enunciated in the Quebec **Charter of Human Rights and Freedoms**.[45]

The victim of the discrimination is usually the one who files the complaint. In some jurisdictions, anyone who knows about discrimination may file a complaint, although the commission may require the consent of the victim. In other jurisdictions, the commission itself may initiate the complaint.

A complaint must be in writing on the forms required by the commission and signed by the complainant. The commission staff usually helps people to file

their complaints. A complaint must be filed promptly. For example, some commissions will not investigate a complaint unless the alleged acts of discrimination are less than six months old.

When the commission receives a complaint, an investigator is assigned to inquire into it. The person against whom the complaint was laid, the respondent, is given a copy of the complaint and is provided with the opportunity to answer the allegations. An investigator has authority to enter the premises involved in the complaint, to require that books, documents, correspondence or records concerning the complaint be produced, to examine applications for employment, payrolls or personnel files, and to speak with employees and other persons who might have information about the complaint.

If it is determined that a complaint is trivial, frivolous, vexatious or made in bad faith, the commission will dismiss the complaint and send a notice of the dismissal to the complainant. In some jurisdictions the complainant may ask the commission to reconsider the dismissal.

If the complaint is not dismissed, the investigator or an appointed conciliator meets with both parties in an attempt to reach a conciliation. In many of the statutes setting up commissions, conciliation attempts are mandatory at this stage. The commissions view the conciliation process as an education for the parties because it is seen as an integral step in eliminating future discrimination. The parties are encouraged to settle their differences. For example, a woman denied a promotion because of her sex might be offered the next available position and a sum of money as compensation. The employer may agree to post a notice to its employees that the employer will abide by the human rights code. The commission is a party to any settlement and must approve the terms and conditions.

If a settlement is not reached, the commission may report the matter to the appropriate government minister. The minister may, in her or his discretion, appoint a board of inquiry to hold a hearing into the complaint. At the federal level, the commission appoints a tribunal to hear the case. In some provinces, if a settlement is not achieved, a board of inquiry may be appointed. If the commission does not recommend the appointment of the board of inquiry, that decision is final

and cannot be challenged by the complainant in the courts;[46] in some provinces, a disappointed complainant may ask the commission itself to review this decision.

In Quebec, if the conciliation has failed the Commission issues formal recommendations to the respondent against whom the complaint was brought. If the respondent does not accept the recommendations, the Commission may file a suit in Superior Court. A board of inquiry hearing is a quasi-judicial proceeding held in public. The commission, the complainant, and the persons named in the complaint may all be parties to the proceedings. A party may appear in person, call witnesses, cross-examine witnesses, and make submissions to the board of inquiry. The parties may be represented by a lawyer or appear alone. The board has the power to subpoena witnesses and to require documents to be produced at the hearing.

After the parties have been heard, the board of inquiry will make a decision as to whether the alleged discrimination has in fact taken place. The board may make an order:

(1) requiring that the party cease discriminating and take steps to adopt a program to prevent a similar contravention in the future;

(2) requiring that the party make available to the complainant any right or privilege that was denied the complainant, including reinstatement in employment;

(3) requiring that the person compensate the complainant for all losses attributable to the discrimination, including loss of wages and fringe benefits;

(4) in some jurisdictions, requiring the person to pay punitive or exemplary damages to a complainant who has suffered mental anguish or loss of self-respect if the discrimination was wilful or reckless.

If an order of the board of inquiry is not obeyed, the commission may take steps to have the order enforced through the courts. Or, the commission may prosecute in criminal court for non-compliance with an order of the board.

There are a number of concerns about the procedures adopted by the commissions:

(a) The process is slow. It may take several years from the date the complaint is filed until a decision is reached by a board of inquiry.

(b) The commission is committed to conciliating the complaint. This procedure encourages the parties to find a middle ground in a closed setting. However, there may be value in sending the matter to a board of inquiry because the board's decision is public and will be used as a precedent for future cases.

(c) A complainant may be forced to accept the offer of the respondent if the conciliator takes the position that the offer is not unreasonable. In most jurisdictions a complainant cannot force the minister or commissioner to appoint a board of inquiry or tribunal.[47]

(d) Monetary awards are low, particularly when compared to damage awards in court proceedings. For example, a woman required to remove her blouse during a job interview was awarded $100 for suffering the humiliation of such discrimination.[48]

(e) The commission has control of the proceedings, including setting timetables and choosing the adjudicators for the board of inquiry or tribunal. That means a woman has very little input in important decisions which may affect her case greatly.

(f) The commission appoints a lawyer (often a government lawyer) to prosecute the case on the commission's behalf. A complainant has no choice as to which lawyer is chosen. If she is unhappy with the result, a complainant may hire and pay for a separate lawyer who may participate in the hearings alongside the lawyer for the commission.

Nevertheless, the commission may be the only avenue a woman has to adjudicate her complaint of discrimination. In other cases, for example a wrongful dismissal suit, it may still be the most advantageous route because the conciliation process and the rules of evidence used in a board of inquiry allow for negotiation which might not otherwise occur. The commission, in addition to conducting the case, will bear all the costs of investigating and adjudicating the complaint unless the complainant elects to engage her own lawyer.

3. Employment Standards Departments

In the area of employment, women have sought protection for equal pay, maternity leave, pensions and fringe benefits from the employment standards branch of the appropriate Ministry of Labour. This employment standards protection, which is in addition to the protection against discrimination contained in the human rights codes, establishes minimum standards for the employer-employee relationship. The statutes, which vary from province to province,[49] are based on an individual complaint model similar to that of the human rights codes. For women there are similar strengths and weaknesses in the enforcement of these standards as there are in the adjudications of human rights complaints.

Generally, a complaint is necessary to trigger an investigation of employment standards. It is also possible for a complainant to enforce these standards through the grievance procedure of the collective agreement if she is represented by a union. Under some statutes, a complainant may sue the employer directly to enforce the statute.[50]

A person who has a complaint against her employer arising from employment may file a complaint with the Employment or Labour Standards Branch of the Ministry of Labour in order to enforce the statutory provisions. An officer from the ministry will be appointed to investigate the complaint. The officer will meet with the complainant and the employer to establish whether there has been a violation of the statute.

The officer who is investigating the case has a duty to act fairly. That is, the officer must permit the complainant to establish her case and must disclose to the complainant all information relevant to the complaint so that the complainant may have a fair opportunity to respond. If the officer determines that the complaint is well founded, the officer may order the employer to comply, the minister may prosecute the employer for breach of the statute, or the ministry may appoint an adjudicator to hold a hearing on the issues. The costs of investigating the complaint and obtaining compliance with the statute are paid by the government except in Quebec, where the complainant must pay half the professional fees of the adjudication. The complainant's half can easily amount to $300 or more.

Although this is an inexpensive process for the complainant (except in Quebec), there are several problems with allowing the government to control the proceedings. First, the process may be slow. Second, if the officer determines that the claim is without merit, there is a very limited right to appeal the decision.

Generally, the complaint model used in both human rights and employment standards cases has several drawbacks. First, it requires that an individual employee file a complaint. Although statutes provide protection from reprisal for pursuing a complaint, most employees are understandably reluctant to challenge their employers. Second, a complaint results in an adjudication on a case-by-case basis. Another woman in similar circumstances will probably have to file her own complaint in order to benefit from the first decision. As a result, the complaint model is a slow piecemeal approach to remedying widespread discrimination.

4. Criminal Justice System

Women generally participate in the criminal justice system either as accused, that is, they have been charged with a criminal offence such as theft, or as victims, that is, they have been raped. In addition, certain statutes affecting the rights of women other than the **Criminal Code**, such as human rights codes or employment standards, provide for the criminal prosecution of offenders who refuse to comply with the statute. In practice the criminal law enforcement provisions of these statutes are seldom used and require the consent of the appropriate minister before proceedings may begin.

In our system of criminal justice,[51] ordinarily the accused is prosecuted by the state, which is represented by the Crown Attorney. The Crown Attorney is retained and paid by the state, and does not, strictly speaking, act for the victim of the offence. The Crown represents the public interest which in many but not all cases is the same as that of the victim. The victim may be required to give evidence for the prosecution's case at the trial. Although the Crown may ask for restitution from the convicted person for the victim, securing "justice" for the victim is not the primary aim of the criminal justice process. Other aims, such as

ensuring an orderly and peaceful society, deterring criminal activity, and punishing wrongdoers are the principal ones of the criminal justice system.

In a criminal prosecution, the Crown must prove beyond a reasonable doubt that the accused committed the crime. This standard is higher than the civil standard of proof which is proof on a balance of probabilities. These aspects of the criminal justice system affect women in a number of ways.

The police and the Crown are aware of the high standard of proof in criminal proceedings. Crimes of rape and other sexual offences, and those of wife and child beating, are usually committed in private without independent witnesses and, in the past, the courts have held that the evidence of women and children in such situations was unreliable. The biases of the police and the Crown may often lead to a decision not to prosecute. The opportunity to proceed by way of private prosecution[52] without the Crown's cooperation and involvement is severely restricted not only by government policy, which varies from province to province, but also by a woman's financial and personal resources.

In offences such as rape, the victim all too often has a difficult time in the course of the long legal process involved in bringing an accused to trial. She is required to tell her story many times to the police, the Crown, at the preliminary hearing, and then at the trial itself, often before a jury. There is increasing recognition that representation for the victim in this process, apart from that offered by the Crown Attorney, can be useful.

In 1978, Mr. Justice Hollingworth considered the issue of representation for the victim in his reasons for sentence in the case of **R. v. Treadwell.**[53] The accused had pleaded guilty and Toronto lawyer Mary Cornish appeared in court on behalf of the victim to speak to the sentence which should be imposed. Justice Hollingworth said, "It seems to me that in rape cases, the complainant should be represented to give the court the benefit of counsel's knowledge as to any traumatic experience from which the complainant might still be suffering."

In **R. v. Ironstand,**[54] heard in the Ontario County Court in 1979 by Judge R. Gilbert, Cornish again spoke to sentence after the accused had pleaded guilty to

rape. Judge Gilbert followed the ruling of Justice Hollingworth but also said that the victim's lawyer should confine her submissions to remarks about the condition of the victim.

It is now the policy of the Ontario Ministry of the Attorney General to recognize these rulings and to include, if the victim wishes, the victim's lawyers in meetings between the Crown and the victim. The lawyer is not, however, involved in presentations during the course of the trial.

5. Unions

If a woman is a member of a bargaining unit and if there is a collective agreement which covers the terms and conditions of her employment, then the union is the exclusive representative of the employee and all disputes arising out of employment must be handled through the grievance procedure. Since 22 per cent of women in the paid work force are unionized,[55] it is important to provide a brief summary of unions and collective agreements so that some consideration may be given to the opportunities which unions offer for the protection of women's rights.[56]

Employees who wish to be represented by a union may apply to the appropriate labour board which will determine the union's support either by counting signed union cards or by a vote. If the union has sufficient support amongst the employees, the labour board will certify the union as the bargaining agent for the employees of that employer. Canadians have a fundamental right to belong to a union. If the employer interferes with that right, for example by firing an employee because she or he is organizing for the union, that person or the union may lodge a complaint with the labour board. The board has wide powers, including the power to order that an employee be reinstated with compensation. After the union is certified, the union represents each employee. The employer must deal through the union and not negotiate with the individual employee in all matters concerning employment. Employees are required to pay monthly union dues which are deducted from their pay.

The employer and the union are required to meet in order to bargain for a collective agreement. A collective agreement is a contract between the employer and the union which contains all the terms and conditions of employment.

If an employee covered by a collective agreement is fired, or is unsuccessful in applying for a promotion, or is paid the wrong wage, that person, and sometimes the union, may file a complaint against the employer. That complaint is called a grievance and the parties meet in an attempt to settle it. If a settlement is not possible, the grievance is referred to a hearing before an independent adjudicator called an arbitrator who listens to both sides, hears submissions, and makes a decision binding on both the employer and the union. There is a very limited right to appeal that decision to the courts. The union and the employer pay all the costs of the arbitration. The arbitration process is usually faster and less costly than similar court proceedings.

As the exclusive representative of the employee, the union has the duty to represent fairly all the employees covered by the collective agreement. If the union fails in its obligation, the member may file a complaint against the union with the labour board which will hear the complaint and make a decision.

When a woman's employment is governed by a collective agreement, she must turn to her union to represent her for all work-related disputes. The union must fairly represent the woman and may not discriminate on the basis of sex. Some women have gained equal pay, fully paid maternity leave, and increased job security by joining a union and negotiating collectively with their employer or by lobbying within existing unions to make their demands priority ones at the bargaining table. Unions are becoming increasingly aware of the needs and wishes of their female members and more women are sitting on union negotiating teams to ensure that women's issues receive prominence during collective bargaining.

E. CONCLUSION

In Chapter II we reviewed how a legal action is begun, who may sue, what are the steps to trial, and what appeals are available for women who are

litigants. It is clear that litigation is a lengthy process and that the legal expenses required to bring an issue to trial are high. If women intend to use litigation under the Charter as a strategy to achieve equality in Canadian society, we must all be prepared to make the commitment to the lengthy process and be prepared to share the expense. It is unrealistic to expect that an individual woman plaintiff will be able to survive without the moral support and the financial commitment from others.

Where will this money come from? A review of the problems associated with private and public funding of litigation illustrates that neither is a complete or easy answer to financing women's issue litigation. Moreover, Charter litigation does not fit neatly into any of the existing models of funding. One option is for women to consider establishing a fund or funds to finance litigation for women under the Charter. With that in mind, we first turn to existing Canadian advocacy groups to see if they are equipped for the task of pursuing litigation of special interest to women under the Charter or if not, whether they provide models or lessons for Canadian women.

Chapter III
CANADIAN ADVOCACY GROUPS

A. SPECIAL INTEREST ADVOCACY GROUPS

1. Women's Groups and Litigation

There is no evidence that any Canadian women's group is conducting any sustained litigation activity, either on behalf of the group itself or through cases brought by others, to establish precedents. From time to time, women's groups have supported the needs of individual women by raising funds, generating publicity or following up court decisions by lobbying in the political arena.

Irene Murdoch, Stella Bliss and Sandra Lovelace are examples of women who, as individuals, have taken legal action against sex discrimination which fundamentally affected the quality of their lives. Although they spoke for themselves, their situations were not unique. The decisions in these cases have had a profound effect on the legal rights of other Canadian women.

Most of the problems faced by Canadian women are shared problems – a fact which accounts for the support often given to women who take legal action. This reality also accounts for the growth over the past century of organizations which speak publicly on behalf of women. They are "special interest groups" in that their concerns are policies affecting women.

There is a growing awareness that courts and tribunals, in interpreting and applying laws, actually make laws or affect the ways in which laws are administered. Thus, litigation activity is being seen as a complement to the political activity in which most special interest women's groups have engaged.

2. Organizing Legal Activity

Any group contemplating adopting a litigation strategy cannot proceed without first addressing some fundamental organizational questions, including the central question of how the cost of providing legal services is to be met. In Canada,

there are no women's groups currently involved in sustained legal activity. One group, the Lesbian Mothers' Defence Fund, was established in Toronto in 1978 in order to litigate on behalf of lesbian mothers who wished to keep or win custody of their children. However, it has been unable to hire legal staff or contribute to the legal costs of cases referred to it because the fund has been frustrated in its attempts to raise donations. It has only been able to act as a support group and provide referrals to lawyers and other professionals who are knowledgeable about lesbian issues.

Although there are a number of advocacy groups in Canada which have been active in legal cases, these groups do not have a feminist focus. The five most prominent of these groups are the Canadian Civil Liberties Association, the Consumers' Association of Canada, the Public Interest Advocacy Centre, the Canadian Environmental Law Association and the Advocacy Resource Centre for the Handicapped.

It should not be assumed, however, that women do not share any goals or interests with such groups. Although they serve different special interests, they have similar general goals, similar concerns about advocacy of this type and similar interests in constitutional law. In short, they are logical allies.

Furthermore, they have made choices about organizations and activities which women can examine and consider. We shall review each group and consider the following: purpose, structure, legal activities and funding.

A summary comparing the significant features of each group will conclude this part. Our study reveals that there is not a single group which provides an exact model for a possible women's legal action fund undertaking Charter litigation. Instead, the groups are useful in illustrating the advantages and disadvantages of the choices they have made.

B. CANADIAN CIVIL LIBERTIES ASSOCIATION (CCLA)

1. Purpose

The Canadian Civil Liberties Association, established in 1964, is well known across Canada because of its widespread and prominent membership base and the frequent media appearances made by Alan Borovoy, its general counsel since 1968.[1] It has been the major "watch-dog" for protecting civil liberties (for example, the right to life, liberty and security) and fundamental freedoms (such as freedom of speech) in Canada.

CCLA itself has been involved since 1968 in about 25 cases, primarily as an intervenor and once as a party. This work is in addition to its appearances before legislative committees at the federal and provincial levels, municipal councils, and federal and provincial ministers of the Crown.

2. Structure

A board of directors is elected by the national membership of approximately 7,000 members and an executive elected by the board which is responsible for policy formulation. The staff, based in Toronto, consists of a general counsel and a research director (both of whom are lawyers), an executive director and a secretary.

3. Legal Activities

CCLA is rarely involved in a case as a party. In most instances, the legal action has been instituted by others and has been decided at trial. CCLA then seeks leave of the appellate court to be granted status as an intervenor (in the Supreme Court of Canada) or **amicus curiae** (in other courts). Many of the cases in which CCLA becomes involved are criminal prosecutions because of the Association's focus on legal civil liberties.

When CCLA acts as a party or an intervenor, it is in fact "the client". In such a case, CCLA will be represented by a staff lawyer or by a lawyer drawn from

the membership who is prepared to donate legal services to the Association. In the latter case, only disbursements are paid by CCLA.

In other worthy cases, CCLA may decide that it does not have to be involved itself, but that it should help a party to the action by providing a lawyer. Again, these services may be provided by a staff lawyer or a volunteer lawyer drawn from its membership.

It should be noted that, although CCLA staff members are based in Toronto, the fact that the Association's membership is drawn from across the country gives it the capacity to act in cases in provinces other than Ontario by drawing on local lawyers. It has appeared in courts at the trial and appeal levels from coast to coast on such diverse issues as abortion, the death penalty, censorship, legislative privilege, committal to a psychiatric facility and confidentiality of health records.[2]

The decisions as to when to intervene and whom to approach to act as counsel are made by the executive in consultation with the general counsel. The general counsel keeps abreast of developments in the law and maintains close working relationships with a number of lawyers in private practice, which results in an "informal" voluntary system of public interest litigation carried on at relatively little cost to CCLA.

4. Funding

It is the policy of CCLA to support itself exclusively through contributions of members and other private individuals; it neither seeks nor accepts government funding. Contributions to CCLA are not tax deductible because the Association is not a charitable organization registered with Revenue Canada. CCL Education Trust, the research and educational branch of CCLA, can issue receipts for tax purposes because it is a charitable organization.

Since the coming into force of the Charter, CCLA has continued its practice of intervening, or attempting to intervene, in significant cases. It has appeared before the Ontario Divisional Court and Court of Appeal in a challenge to

the Ontario Board of Censors,[3] and before the Ontario Court of Appeal in a case[4] which struck down the reverse onus provisions of the **Narcotic Control Act.**[5]

The Saskatchewan Court of Queen's Bench denied CCLA leave to intervene in the challenge brought by Joseph Borowski to the abortion section of the **Criminal Code.**[6] The Association has unsuccessfully sought from the Supreme Court of Canada leave to appeal as an intervenor[7] on two occasions since the Charter has come into force.

The Association has advertised its willingness to consult with lawyers across the country on any Charter litigation as well as to consider intervention in Charter cases.

C. REGULATED INDUSTRIES PROGRAM (RIP)/ CONSUMERS' ASSOCIATION OF CANADA (CAC)

1. Purpose

The Regulated Industries Program is a division of the Consumers' Association of Canada, a very active group with a large national membership of approximately 150,000 in February 1984. Founded in 1973, RIP was given a mandate which included consumer representation before federal tribunals regulating utilities (for example, the Canadian Transport Commission and the Canadian Radio-television and Telecommunications Commission) and before parliamentary committees. This mandate was broadened in 1974 to include appearances before courts in cases which could have a significant impact on the regulation of utilities.

2. Structure

In 1975, the Regulated Industries Policy Board (now called the Regulated Industries Program Council) was established by CAC to coordinate the development of policy positions across a broad spectrum of regulated industries (such as telephone, radio and television, trucking, oil and gas). It is made up of a maximum of 10 members from all parts of Canada. One of the members of the board serves as

a liaison between it and the executive of CAC. In recent years, the board has been attempting to hold its meeting in conjunction with CAC's annual meeting to ensure greater coordination between RIP and the main group.

RIP has a general counsel who serves as program director, an executive secretary and researchers who work on contracts of varying length in connection with particular projects.

3. Legal Activities

The range and level of RIP activity on behalf of consumers is impressive as evidenced by the 85-page Activity Review contained in the 1980-81 annual report.[8] The activities are summarized under a number of main categories, including:

(1) regulatory interventions in telecommunications, airlines, trucking, agriculture and broadcasting;

(2) appeals to the courts;

(3) monitoring regulatory developments;

(4) Parliamentary Committee appearances, concerning the Post Office Crown Corporation Bill and Access to Information Bill;

(5) regulatory reform;

(6) regulatory research and publications;

(7) Firenza class action;

(8) provincial initiatives by CAC Yukon and CAC Northwest Territories.

Since 1975, RIP has placed more and more emphasis on developing a program based on long-range planning and a qualified staff. Regulatory proceedings can stretch over years rather than months. Effectiveness may depend on a group having sufficient financial resources to sustain its activities from year to year. This sustained presence, coupled with a core of full-time in-house staff, permits monitoring of regulatory activities and early detection of good test case situations.

RIP has rejected a random, sporadic approach to consumer advocacy. As the 1981 annual report stated: "It is necessary that all participants appearing before the regulatory boards, as well as the regulators themselves, be convinced that the consumer advocate will return time after time to make a firm and sustained representation of the consumer viewpoint."[9]

There is, moreover, the need to be in place, with resources, to respond immediately and decisively to the initiatives of both the regulator and the regulated industry. Too often the consumer advocate can only react to important developments affecting consumers rather than initiating actions on their behalf.

The 1981 RIP annual report also pointed out that an accountability structure must be developed within the organization to truly allow it to put forth the views of as wide a cross-section of the public as possible. If the views advanced by advocates do not represent the concerns of a wide cross-section of Canadian consumers, the report said, "advocacy loses its representative character and becomes largely a series of non-accountable individual forays."[10]

4. Funding

The majority of the funding for RIP comes from the federal department of Consumer and Corporate Affairs. In 1982-83, its contribution amounted to $300,000 out of a total budget of $314,000. Since its inception, virtually all of the group's funding has come from this source. In that same year, donations amounted to $6,000 and RIP was awarded costs from regulatory proceedings in the amount of $65,000. The largest expenditure was $95,000 for salaries. Another $65,000 was spent on consultants and expert witnesses.

RIP is investigating ways of diversifying its funding sources, including direct mail solicitation, because funding is falling behind the rate of inflation.

D. PUBLIC INTEREST ADVOCACY CENTRE (PIAC)

1. Purpose

The Public Interest Advocacy Centre is younger than both the Canadian Civil Liberties Association and the Consumers' Association of Canada, having been founded in 1976 by Andrew Roman, a Toronto lawyer.[11] PIAC was established in order to provide assistance to special interest groups that wished to be represented before tribunals. It is now a federal non-profit corporation operating as a public interest law office with branches in Ottawa and Toronto and closely affiliated to similar organizations in British Columbia and Manitoba.

The objectives of PIAC established by the board of directors are as follows:

(1) to provide advocacy services to clients who would otherwise not be represented on important matters of public interest;

(2) to facilitate training in public interest advocacy skills;

(3) to engage in research of public interest issues;

(4) to assist in and promote the activity of public interest group representation throughout Canada;.

(5) to act as a liaison between other groups engaged in public interest advocacy and to cooperate with such groups.

The Centre chose the regulatory process as its major area of concentration largely because of the lack of representation before administrative tribunals available to either private citizens or legal aid plan clients and the powerful impact upon the individual that such bodies can have. The cases handled by PIAC tend to be few in number and are chosen to reflect issues of major importance in a limited subject area. It has chosen to concentrate its activities on three main areas of interest: telecommunications, energy utilities and social assistance. Among these, telecommunications cases account for the majority of its work.

2. Structure

From its inception, PIAC has maintained the policy of hiring a small staff that can develop a familiarity with specific tribunals and expertise in the matters which come before them. Andrew Roman, general counsel, is its founder. He works in the Toronto office with the assistance of a clerk and legal secretary. Max Wolpert, associate general counsel, is in charge of the Ottawa branch which is also staffed by a secretary.

The newer Public Interest Advocacy Centre in British Columbia is headed by Dick Gathercole, while Arnie Peltz is in charge of the Manitoba organization which is operated under the auspices of the Manitoba Legal Aid Plan. PIAC has also entered preliminary discussions with the Association des Consommateurs du Québec with a view to establishing another cooperating but autonomous body in that province.

The Ontario-based PIAC handles matters of interest to the Centre and its clients in all other parts of Canada. Policy decisions regarding PIAC are made by its nine-member board drawn from across the country.

3. Legal Activities

PIAC, unlike the Canadian Civil Liberties Association or the Consumers' Association of Canada, rarely takes the position of "client"; rather, it acts as counsel to groups in need of legal assistance.

Matters handled by PIAC are usually those of concern to its longstanding clients such as the National Anti-Poverty Association (NAPO), the Consumers' Association of Canada (CAC), several native groups (such as the Inuit Tapirisat of Canada) and environmental groups (such as the Canadian Arctic Resources Committee).

Approximately one half of PIAC's work comes from these regular sources who give the Centre blanket authority each year to handle matters on their behalf. If an issue of concern to one of these groups arises, PIAC informs those involved and

investigation ensues, often leading to intervention in a hearing. In other situations, directors will contact PIAC staff on relevant matters or interest groups will ask directly for assistance with particular legal problems. Most of the matters PIAC handles tend to be oriented towards consumer and regulatory issues because of the organization's major source of funding.

The criteria established by PIAC for its selection of cases are basically as follows:

(1) the group or individual concerned must not be able to obtain legal assistance elsewhere;

(2) the case must be of interest to more than just an individual litigant; group matters, cases with wide-ranging implications for segments of the population and test cases are all suitable for PIAC action.

If a case within these criteria is brought to the attention of PIAC's lawyers, they have the authority to accept it, but are required to report to the directors on their activities. Cases which seem of interest but which fall outside the consumer/regulatory realm generally require the approval of the three-person executive committee before they can be accepted. The lawyers have a reasonable degree of autonomy and, so far, have not had to turn away many prospective clients.

Once PIAC accepts a case, it generally will take responsibility for the entire course of the action; often proceedings and appeals will continue for several years. At the tribunal level, most appearances are made by one of the two counsel; in some appeals to the Federal Court of Appeal or Supreme Court of Canada, well-known barristers assist PIAC by arguing a case prepared by its staff.

In its chosen areas of expertise, PIAC has been effective and active. In the area of telecommunications, PIAC represented NAPO and others at CRTC hearings to set telephone rates and obtained orders which rolled back price increases, reduced party line rates and curtailed the practice of requiring security deposits. It acted for the Inuit in advocating improvements in telephone services in

the North, reductions in long distance fees and the provision of Inuit-speaking operators.

PIAC has not always been successful. It was denied the right to intervene in the CRTC cable television rate hearings, and its complaint that certain commissioners were absent during part of a hearing was dismissed.[12]

In regard to energy utilities, PIAC has made a submission to the Ontario Energy Board on costing and pricing; appeared before the Atomic Energy Board on the issue of public access to nuclear safety information; delayed the Alaska Pipeline hearings until the applicants provided full disclosure of the plans to all parties; and obtained a court order prohibiting seven members of the Yukon Territory Water Board from hearing a case because they were biased.

PIAC showed an early interest in social assistance cases. For instance, it took part in unsuccessful appeals of the **Bliss** case on unemployment insurance maternity benefits and in appeals of another case concerning non-fraudulent overpayment of unemployment insurance benefits. It is now involved in fewer cases of this type but has expressed a desire to become active in appropriate Charter cases. PIAC has also participated in two cases on behalf of handicapped groups which addressed the rights of handicapped consumers to hospital services.

One of the more successful activities of PIAC in the area of social assistance was its advocacy on behalf of two Toronto groups, the Regent's Park Community Improvement Association and the Falstaff Towers Residents' Association. A study commissioned for the Social Services Committee of the Metropolitan Council recommended that public housing in Ontario be dismantled. With the assistance of PIAC, these associations convinced the Social Services Committee that large housing projects can often be considered legitimate communities serving the needs of the poor. The initial study was quashed, and the Centre and its clients were subsequently invited by the committee to assist in developing a new policy in this area.[13]

PIAC sees such invitations as indicative of its acceptance as a useful entity by regulatory and other government bodies. PIAC has also participated by

request in a review group on the Regulatory Reform of Crown Agencies and on the social impact subcommittee of the Canadian Videotex Consultative Committee.

Aside from matters of litigation, PIAC is involved in various research and training programs through which it educates different groups on subjects of concern to the Centre. Its affiliates, the Public Interest Resource Centre and the Public Interest Training Centre, were both established in 1980.

The Public Interest Training Centre provides advocacy training programs to law schools and seminars on dealing with regulatory tribunals to citizens' groups. Through such instruction, PIAC has enabled some of its clients such as the Canadian Arctic Resources Committee, the Saskatoon Environmental Society and the Yukon Conservation Society, to represent their own interests effectively when appearing before various tribunals. Several other similar groups have recently contacted the Centre in order to arrange training seminars.

In addition, PIAC lawyers take part in numerous speaking engagements and Centre researchers have prepared several informative handbooks and articles on public access to participation in administrative hearings. By informing and representing citizens' groups, PIAC feels it is providing an important service in the regulatory field.

4. Funding

The majority of the funding for PIAC comes from the federal department of Consumer and Corporate Affairs; the Centre receives approximately $250,000 each year. In the past, other organizations such as the Donner Canadian Foundation, the Law School Training Programme and the Ontario Ministry of the Environment have funded individual projects; this support ended with the completion of the specific project.

In 1978, CRTC decided to award costs in hearings to intervenors who were deemed to have made a substantial contribution to the proceedings.[14] Although Bell Canada has attacked the validity of this practice and a decision on the matter is pending in the Federal Court of Appeal, PIAC has already been awarded

$125,000 under the plan. The money is currently being held in trust, but if the court's decision is favourable, such funds may come to support much of the Centre's litigation activity.

E. ADVOCACY RESOURCES CENTRE FOR THE HANDICAPPED (ARCH)

1. Purpose

The Advocacy Resources Centre for the Handicapped is a clinic located in Toronto which provides legal services for the handicapped.[15] In August 1978, a lawyer, David Baker, proposed setting up such a clinic to groups involved with the handicapped, including BOOST (Blind Organization of Ontario with Self-help Tactics) and the Canadian Hearing Society. He persuaded them to combine forces and make a joint application to the Ontario Legal Aid Plan for clinic funding. The Plan granted funding in December 1979.

ARCH provides legal services to the handicapped on cases referred to it from its member organizations. About 1,500 requests for services are received each year.

The Centre has decided to limit its size. It does not intend to provide all legal services for all handicapped persons. For obvious practical reasons, its aim is to keep the handicapped in the normal legal stream. ARCH's long-term goals include:

(1) to work within the legal system consulting with and assisting existing firms and clinics to provide direct legal services to handicapped people on a provincial basis;

(2) to serve as a resource to agencies and groups representing handicapped people;

(3) to perform legal research;

(4) to work to establish legal precedents which will help the handicapped.

2. Structure

ARCH is an Ontario non-profit corporation. Handicapped people from its 30 member organizations sit on the board of directors. In addition, there are four members-at-large chosen for their particular expertise; for example, the members include an accountant and a fundraiser. The staff consists of an executive director, a lawyer, a community legal worker, an articling student, and eight other members.

3. Legal Activities

Like the Public Interest Advocacy Centre, ARCH is primarily a provider of legal assistance. Unlike PIAC, however, it prefers to act on behalf of an individual, not a group.

Each request is screened by a committee of the board of directors, comprised mainly of lawyers, which meets once a month. The committee must consider the income of the person, using guidelines set down by the Ontario Legal Aid Plan, but adjusting the threshold for eligibility to reflect the special expenditures related to the individual's handicap. Services may be provided to an individual who is not financially eligible if the case has implications for a substantial number of people who would be eligible for ARCH services. The priorities for acceptance of cases are:

(1) the case must have broad precedent-setting implications;

(2) the case cannot be referred to another generic legal service;

(3) the case is relevant to more than one type of disability;

(4) the case requires special social supports available from the member groups.

If the Centre takes a case, those below the financial guidelines will be provided staff legal services free of charge; they need pay only for disbursements unless such payments would result in hardship. Those above the financial guidelines

must pay for disbursements and may be invited to make a contribution equal to a reasonable charge for the service provided. ARCH has sought funding for disbursements on specific cases from the Legal Aid Plan and from member groups.

Generally, ARCH accepts one third of its applicants, refers one third to other lawyers and the remaining third to the Legal Aid Plan. For example, a handicapped person seeking a divorce would be referred to the private bar or, if the person could not afford legal services on a fee-for-service basis, to the Legal Aid Plan.

Examples of ARCH's advocacy for the handicapped include an action to have employees in sheltered workshops covered by the Ontario **Workmen's Compensation Act;**[16] and a complaint under the Ontario **Employment Standards Act**[17] to have employees in sheltered workshops paid the minimum wage.

ARCH has intervened on behalf of the handicapped in court proceedings and before administrative tribunals. For instance, the Centre sought standing on behalf of eight of its member groups before a coroner's inquest investigating the death of a mentally ill patient. The coroner's decision to deny standing to ARCH was upheld by the Ontario Divisional Court.[18] In fact, ARCH did stay throughout the inquest and participated by having the coroner ask some of its questions.

The Centre intends to intervene before the Canadian Radio-television and Telecommunications Commission on behalf of deaf persons, and before the Canadian Transport Commission on behalf of handicapped users of trains and airplanes. ARCH made a submission to the Cabinet of the Ontario Government arising out of an Ontario Municipal Board decision concerning group homes in North York.[19]

ARCH itself has not participated in lobbying, although its member groups are active in this area. Instead, ARCH acts as a resource to assist these groups in making more effective presentations. Some of these presentations have dealt with the **Canadian Charter of Rights and Freedoms,** the new Ontario **Human Rights Code,**[20] and the Weiler Commission on the Workmen's Compensation Board.[21]

Education of the public on issues affecting the handicapped is an important component of the activities of ARCH. Staff members speak at least once a week to interested groups and there is a large volunteer speakers' bureau. In August 1981, ARCH sponsored the first national conference on access to legal services for the handicapped. Conference participation was designed to ensure that members of the legal profession met with the handicapped delegates. A cross-disability approach – that is, an approach addressing a number of different handicaps – to legal rights was encouraged. The Centre participates in a committee of the Ontario Legal Aid Plan which deals with the problems of legal services for the handicapped. ARCH also sponsored a resolution concerning legal services for the handicapped which was adopted by the Young Lawyers Section of the Canadian Bar Association. It publishes a newsletter which provides information on current cases and trends in the law. ARCH staff members are regularly consulted by lawyers and judges for advice on cases involving the handicapped. As well, staff members teach a course on law and the handicapped.

4. Funding

ARCH receives funding from various sources. In 1981, the Ontario Legal Aid Plan gave $88,000 to fund some staff salaries and part of the overhead costs with the condition that ARCH raise other funding. In addition, ARCH raised $35,500 in private donations in 1981. Over the last few years, ARCH has received grants from the federal Department of Justice ($101,000), Canada Manpower and Immigration, the Municipality of Metropolitan Toronto ($14,000), the Law Foundation of Ontario and the Atkinson Foundation. Ongoing funding from a variety of sources is seen as critical to the survival of ARCH.

F. CANADIAN ENVIRONMENTAL LAW ASSOCIATION (CELA)/ CANADIAN ENVIRONMENTAL LAW RESEARCH FOUNDATION (CELRF)

1. Purpose

In 1970, a group of lawyers, scientists and conservationists founded the Canadian Environmental Law Association and the Canadian Environmental Law

Research Foundation.[22] The group recognized three things: first, there are some legal tools that can be used to stop or lessen environmental damage; second, existing laws pertaining to the environment need to be improved; and third, the public should be educated to know its environmental rights and how best to enforce them. Law reform, in both the substantive and procedural senses, was the overall concern.

2. Structure

Two organizations with related concerns and goals were established in order to take advantage of fundraising opportunities. CELRF is a non-profit Ontario corporation and is a charitable organization registered with Revenue Canada. Donations to it are tax-deductible; this is thought to be an incentive for donors.

CELRF has a large board of honorary directors comprised of community leaders with expertise and interest in environmental subjects. A full-time executive director functions, in part, as a fundraiser.

As a registered charity, CELRF is restricted in its activity in that it cannot be a vocal and visible advocate for any particular legislative or administrative policy or strategy. CELRF does not fund lawsuits.

CELA, on the other hand, is actively involved in day-to-day legal disputes. Since 1977, it has run a free legal advisory clinic restricted to environmental law which is funded by the Ontario Legal Aid Plan. The clinic is staffed by three lawyers and two articling students.

In 1982-83, the clinic received approximately 570 inquiries from the public. Case selection is made by the legal committee of the board of directors which is comprised of the legal staff, a full-time researcher and some non-staff members of the board. Any case which would involve an appearance before a court or a tribunal must go before the legal committee.

The clinic has two overall concerns in the selection of cases. First, the Ontario Legal Aid Plan has established financial eligibility guidelines. Although any

member of the public is entitled to receive advice and assistance, a person requesting representation must be financially eligible.

Second, CELA considers the importance of the case. It looks for major environmental issues where the decision will set a precedent. Certain types of cases require expert knowledge or testimony which would be difficult for a lawyer in private practice to obtain but which is available through CELA. (It should be noted that the clinic will provide legal representation but the client must raise any money required to pay expert witnesses.) From time to time, CELA may also have a special interest in certain issues. For instance, many of its 1982 cases related to problems resulting from the use and disposal of toxic chemicals and hazardous wastes.

CELA may be aware of an important environmental law issue even though a complainant has not come forward. In those cases, it will look for someone who is affected. It often acts as counsel to citizens' groups which have organized to address a local problem. CELA rarely attempts to act on its own behalf for two reasons: first, it is an unincorporated association and therefore may be without standing to sue; second, its mandate from the Ontario Legal Aid Plan is to act for clients.

Depending on the importance of the issues and the level of courts, CELA may retain a lawyer from private practice to undertake the court appearances. It has excellent relationships with experienced members of the bar who accept this work on a volunteer basis, that is, they are not paid a fee, just their out-of-pocket expenses, or disbursements.

At any one time, the clinic will have a caseload of 20 active cases. In addition to acting on behalf of its clients, CELA maintains a high public profile in discussions about environmental law. Its 1982-83 annual report lists 26 speeches given by various staff members. Eleven briefs were submitted to government or legislative bodies. CELA often serves as a member of a coalition, for example, the Canadian Coalition on Acid Rain,[23] which concentrates on specific problems.

CELRF is the publishing arm of CELA which produces books, articles and research studies for both technical and law audiences; in fact, over 100 publications are available. It also publishes the **Canadian Environmental Law Reports**, a bimonthly compilation of recent court decisions and the only publication of its kind in Canada, and sponsors conferences on timely topics.

3. Funding

CELA does not publish a financial statement but does report to the Ontario Legal Aid Plan.

For the fiscal year ending June 30, 1982, CELRF raised a total of $103,462 including $55,363 from corporate and individual donations and $39,322 from the sale of its publications and from conference fees. The biggest expenditures were for salaries ($106,966), benefits ($34,707), printing costs ($13,742), conference expenses ($18,584) and special research projects ($26,212).[24]

G. CONCLUSION

The preceding review of advocacy groups which use legal activity as a major means of advancing their objectives has established several general points of particular interest to women.

First, given the complexity of the factual issues involved and the specialized nature of our legal system, groups which undertake legal advocacy should have a narrow subject focus in order to develop expertise.

Second, notwithstanding a narrow subject focus, groups should develop a sense of what problems and solutions will present the greatest gain to the greatest number of that part of the community which they have chosen to serve.

Third, because of the need for a narrow subject focus and sensitivity to the constituency served, none of the existing advocacy groups is an appropriate vehicle for women's equality rights litigation.

Still, they are a useful pool of information for anyone planning to establish a fund. Some aspects can be highlighted.

1. Purpose

Some groups, like the Canadian Civil Liberties Association (CCLA) and the Consumers' Association of Canada (CAC), take part in legal cases primarily on their own behalf. Others, like the Public Interest Advocacy Centre (PIAC), the Advocacy Resource Centre for the Handicapped (ARCH) and the Canadian Environmental Law Association (CELA), provide services to affected groups or individuals.

In all groups, cases are selected not just for the impact or outcome they will have on the group or individual, but more importantly with a view to the contribution that the outcome will make to desired changes in the law. In short, the careful selection of cases is a necessary component of law reform.

2. Structure

There is a key distinction to be made between advocacy groups which have individual members (CCLA and CAC) and those which do not (PIAC and CELA). ARCH is in some ways a hybrid because it has members who are groups. CCLA and CAC are the groups most likely to participate on their own behalf and they can legitimately argue that they are representing a constituency.

The characteristics of the membership are important; for instance, CCLA has many lawyers as members who can be used as volunteer lawyers in court cases. CAC's membership does not have as many lawyers and the required knowledge of regulated industries militates against the use of volunteer lawyers because they lack the necessary expertise.

Some groups are incorporated (PIAC and ARCH) but most are not (CCLA, CELA, CAC-Regulated Industries Program). None of the groups involved in litigation is a registered charitable organization. In every group, staff members are selected for their expertise in law and other areas and are accountable to a board of

directors. The question of accountability also arises where a group depends on membership solicited from Canadians at large. Members often wish to play a role in deciding the overall policies and priorities of an organization and cannot be ignored. A membership organization, however, must devote resources to maintaining and increasing its rolls. It must also develop means of resolving disputes amongst members or with management. On the other hand, without a membership base, an organization must find ways to develop links to the people it wishes to serve. However, as a practical matter, in all types of organizations the day-to-day decision-making about the conduct of cases is usually left to staff members, which indicates the important role that legal staff members play.

3. Legal Activities

All the groups have a history of sustained legal activity, although not all of them attempt to control individual cases or a progression of cases in order to develop a point of law. CCLA has been involved in many cases but it would be difficult to describe its activities as other than a "watch-dog" because its participation has been **ad hoc** and not consistent in terms of choice of issues or the timing of actions taken. On the other hand, CAC attempts to participate in every major proceeding and has developed a sustained presence at regulatory tribunals.

Part of the difference lies in how each group defines its scope. CCLA is national, with a broad range of concerns about legal civil liberties and fundamental freedoms which arise in many forums. This makes it difficult for CCLA to concentrate its efforts in one area. CAC, on the other hand, focuses on a limited number of federal regulatory tribunals and can make its presence felt consistently. PIAC, ARCH and CELA all have a national range of vision but are without the organizational reach to be a central player in each Canadian jurisdiction. PIAC has attempted to address this problem by establishing affiliates in different provinces.

An important point is that litigation is never carried on to the exclusion of lobbying for legislative reform and public education. The advocacy groups are centres of expertise and information which can be used in a number of ways. Litigation is slow and expensive; some change may be better achieved by other

routes. There will always be cases, however, where courts and tribunals are the only recourse.

4. Funding

All of the groups except CCLA are dependent on one source of funds, usually government funds. CAC, PIAC, ARCH and CELA are supported by federal or provincial government grants. Some groups view this close dependency on government funding as disquieting because they fear government control of their activities. As well, dependence on any one source, whether it be government or foundation funding, can make the financial base precarious if the funding should be withdrawn. The completely independent route, such as the one pursued by CCLA, depends on a very organized direct-mail campaign, and substantial public relations work by its general counsel and executive. As well, CCLA relies on its traditionally close ties with organized labour.

The level of funds required by different groups will vary according to their method of delivery of legal services. For instance, CCLA's litigation costs are substantially reduced by the use of volunteer lawyers. Most groups use volunteers, particularly if they have access to senior counsel experienced before appellate courts.

In addition to the expense of lawyer's fees, there is also the expense of disbursements. All of the groups, when acting on behalf of another person, require that disbursements be paid by that person. In cases where expert witnesses or statistical information is required, these expenses can be very high. A group is more likely to be able to afford such expenses than an individual. ARCH has discovered that this can be a problem, for example, where an individual has suffered economic loss as a result of discrimination. Litigation of equality rights cases will pose the same financial problems.

Now that we have reviewed the Canadian experience, let us consider how similar groups have developed in the United States.

Chapter IV
THE AMERICAN EXPERIENCE

A. THE DEVELOPMENT OF PUBLIC INTEREST LAW

Legal activity described as public interest law is best illustrated by describing an actual case. The story of Linda Carol Brown, a young black schoolgirl from Topeka, Kansas, offers a good example.[1]

In 1950, Topeka had separate public school systems for white and black children. Young black children were not allowed to attend any of the 18 elementary schools for whites, which were situated closer to where they lived. They were bussed long distances to attend the four elementary schools reserved for them. Once blacks left school, their job opportunities in the city were severely limited. Unions did not admit black members and blacks were not permitted to hold white-collar jobs. Blacks retreated to a world of their own, servicing other blacks in their own restaurants and beauty parlours, or in filling menial jobs such as janitors or maids.

During the summer of 1950, the National Association for the Advancement of Colored People (NAACP), an organization committed to advancing the rights of blacks, decided to challenge such segregation laws and practices and approached the parents of black children who had to make particularly long trips to school. One such parent was Oliver Brown, a veteran of World War II, a welder in a repair shop and the father of three daughters. His eldest daughter, Linda Carol, was seven years old at the time. In order to get to school she had to leave home at 7:40 a.m., cross a dangerous train switching yard, and catch a bus at 8:00 a.m. The bus was often late and the children had to wait in the cold and darkness of prairie winter mornings. The white school was a safe, seven-block walk. In September 1950, Brown decided to try to register Linda at the white school. The principal of the school refused to register her.

NAACP filed a lawsuit on behalf of Brown and other Topeka parents on February 28, 1951. The trial began June 25, 1951, and a few weeks later the District Court of Kansas, in a unanimous decision, found, on the one hand, that the

segregation of white and black children in public schools had a detrimental effect on black children and the impact was greater because segregation was approved in law. On the other hand, the court found that the physical facilities for black children were comparable to those for whites and a bus was provided for black children. Therefore, the court concluded there was no wilful, intentional or substantial discrimination. As a result, Oliver Brown's case was dismissed because segregation in a separate school was not a denial of equal protection.[2]

NAACP coordinated similar cases in Delaware, Virginia, South Carolina and the District of Columbia. All of these cases resulted in similar decisions at the lower court level; they were appealed to the United States Supreme Court and were heard together on December 8, 1952. The cases were re-argued on December 7, 1953, and the Court gave its unanimous decision on May 17, 1954, in **Brown v. Board of Education.** The Chief Justice stated:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[3]

The Court held that in the field of public education, the doctrine of "separate but equal" had no place. Separate educational facilities were inherently unequal. Black children, such as Linda Carol Brown, had been denied their right to equal protection under the Constitution of the United States. School boards across the United States were ordered to make a prompt and reasonable start towards full compliance with the Court's decision and public schools were to open their doors to all children with all deliberate speed.[4]

This landmark decision in the development of legal rights for blacks established that separate was never equal. In the United States it became the cornerstone in the struggle for constitutional protection from discrimination sought by blacks, other minorities and women.

The **Brown** case is a perfect example of how crucial and how effective public interest law can be. Public interest law is the name given to the legal

representation of interests that historically have been unrepresented or under-represented in the legal process. These include not only the poor and disadvantaged, but also groups with specific goals and ordinary citizens who, because they cannot afford lawyers to represent them, lack access to forums where their legal interests are affected. Public interest lawyers have tried to provide representation to these individuals and groups in order to ensure that their interests are understood, acknowledged and taken into consideration when decisions affecting them are made. Public interest law is a term developed in the United States in the early 1960's. Its roots can be traced back over a century through various movements, programs and organizations.[5] Although it is not the purpose of this report to identify and review these developments in detail, several aspects of that development are pertinent because they explain, in part, the form that women's participation has taken.

Before the birth of the legal aid movement in the late 1800's in the United States, individual lawyers would, as a charitable activity, provide services to poor clients who came to their attention. By about 1875, it was recognized that access to the legal system was meaningless if one could not afford to pay the price of participation, and there were many who could not. In its first stages, therefore, the goal of the legal aid movement was to provide legal aid as a legitimate social service to those in need.

By the first quarter of the twentieth century, however, proponents of legal aid articulated the view that ". . . there was a responsibility on the part of the Bar as a whole to provide opportunities for unrepresented people to secure access to the justice system . . ."[6] Thus, the focus ceased to be purely charitable and became in part a political one that reflected a concern about the relationship between citizens and the laws which govern them. Ways had to be found to represent the views of a broader public that lacked the financial resources to gain access to the judicial system.

One significant early aspect of the growth of legal aid in the United States was the development of a new method of delivery of services that deviated from the traditional commercial law firm, that is, independent law offices staffed by salaried lawyers and funded by publicly raised monies. It was first introduced by

the Legal Aid Society of New York and was adopted in other cities before the 1920's.[7]

By the middle of the twentieth century, certain philosophical and organizational characteristics flowing out of the legal aid movement became cornerstones for public interest law: the notion that lawyers have a **duty** to ensure that certain interests be represented; the attempt to provide services **systematically**; and the use of independently funded offices with **salaried staff** to provide services.

The American legal aid movement grew up from city to city and was designed to serve individual and local concerns. In fact, many problems were common to large numbers of people and it took the development of national public service organizations to consolidate concerns and strategies. By 1918, for instance, the American Civil Liberties Union (ACLU), an organization designed to protect individual liberties, began to address national issues such as the restrictions placed by government during the First World War on the fundamental rights of pacifists, conscientious objectors and labour unions. Gradually, as ACLU gained members from across the United States, it spawned a network of affiliates at the local and state level and the focus shifted to policy issues of national importance.

Since the late 1800's there had been a number of organizations which used litigation as a tool to forward the goals of the organization. In the 1930's, NAACP, a citizens' lobby and service organization with a well-defined sense of the issues important for its constituency, took the process one step further and adopted a strategic plan for using litigation to reach specific social objectives.[8] In doing so, NAACP developed a structural model that has been adopted by other public interest law organizations.[9]

By the beginning of the 1960's therefore, a combination of factors – a growing sense of social responsibility, the adoption of a systematic approach to litigation, the rise of non-profit law firms, an interest in national policy issues and the development of strategic litigation – had come together to form an approach to legal activity now described as public interest law. Most importantly, by this time public interest law was shown to be a success. Victories such as the United States

Supreme Court decision in **Brown v. Board of Education** had enormous significance, not just for blacks and other minorities, but for anyone interested in using litigation to make major social changes.

The old adage that "success breeds success" applies to the recent growth in public interest law. That growth, however, was fuelled in large part by money that came from one source. In the early 1960's, private charitable foundations became principal players in public interest law when they donated funds in response to an appeal from the civil rights movement. The willingness of these foundations to give financial support to organizations that were using the law as a tool to advance substantive goals was a revolutionary development. As a result of this development, there was an explosion of legal activity and it cannot be over-emphasized how important the availability of foundation funding has proved to be for the rapid development of public interest law.[10]

Furthermore, legal activity on public interest issues was heightened by the dramatic growth in awareness of, and activism on, social issues that became the hallmark of American society in the 1960's – the civil rights and anti-war movements, to name two. By the end of the decade, citizens and foundations alike were supporting new causes beyond those traditional ones: they included consumers' rights, the defence of the environment, minority citizen representation in administrative processes, legal education and children's rights. As a result, existing organizations were able to expand and new ones were created. Needless to say, it was during this period that women's law funds were born in the United States. We have the advantage of being able to review these American funds after a period of real growth, a time when they too are pausing to reflect on what they have accomplished and where they should be going. Before introducing specific organizations, however, we shall highlight earlier developments in women's rights in the United States which give a useful perspective on the current activity.

B. HIGHLIGHTS OF LEGAL ACTIVISM IN THE AMERICAN WOMEN'S MOVEMENT

American women had used litigation as a means of achieving social change before the growth in public interest law in the 1960's. In fact, their activity

in the legal system spans more than a century. The early experience is generally instructive for us.

The attempt by American women to achieve constitutional protection for equality has been a long and arduous one, spread sporadically over many decades. The lesson for us is that there are seldom quick victories: the move towards change proceeds at glacial speed. It also does not proceed evenly; sometimes losses have the effect of strengthening the forward motion while apparent victories can have long-term negative results.

Furthermore, improvements achieved in the development of legal doctrine with respect to one group calling on the courts will not necessarily be applied to another, however similar the discrimination they face. Women worked for suffrage for blacks, and then were denied the vote themselves. Women worked hard to bring cases before the United States Supreme Court in order to have the Court apply the same standard of judicial scrutiny to sex discrimination as it did to race discrimination; that victory still eludes them.

The final lesson to be learned is that whatever arguments are made, or whatever kinds of evidence are introduced before the courts, they must be consistent with long-term goals. Courts collectively have very long memories because they rely on earlier decisions for guidance in each case which comes before them. Theories introduced to the court in order to produce victories in one area and at one time may be called upon to defeat all new cases at a later date.

These specific lessons have been gleaned from the early history of women's litigation, particularly from two early campaigns waged by women's organizations to secure the vote and to ensure better working conditions, and from the more recent campaign to bring the law on sex equality into line with race equality. There have been various lead players in the campaigns, including the National Women's Suffrage Association, the National Consumers' League and various women's law funds to be discussed later.

1. The Fight for the Vote

Following the Civil War in the United States, the Constitution (specifically, the Bill of Rights) was amended to extend and clarify the rights of black citizens. Section 1 of Article XIV, known as the "Fourteenth Amendment", which was ratified on July 9, 1868, states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; **nor deny to any person within its jurisdiction the equal protection of the laws . . .**[11] (emphasis added).

The emphasized portion of the Fourteenth Amendment is usually called the "Equal Protection Clause". Article XV followed in 1870; it guarantees a citizen's right to vote notwithstanding "race, color or previous condition of servitude."

Women were active in the fight to enfranchise the blacks. When that victory had been won, women expected to be the beneficiaries of these amendments and to be given the vote. However, the women's suffrage movement, which had its roots in the abolitionist movement, had difficulty securing for women the right to vote. Using self-help tactics in 1871-72, a number of women went to the polls and asserted their right to vote based on the wording of the Fourteenth Amendment. Three cases resulted: two were charges against electoral authorities who had refused to register women and one was a criminal charge against Susan B. Anthony, the famous suffragette, who had voted. One of the registration cases, **Minor v. Happersett,**[12] went to the United States Supreme Court; the Court refused to construe the general words of the Fourteenth Amendment as a guarantee of women's suffrage.

The National Women's Suffrage Association (NWSA), which had encouraged the individual women to act, expected that they would lose in court. Their strategy was to obtain a decision of the court interpreting the limits of the Fourteenth Amendment against women and to wave this decision as a banner to

arouse people to fight for women's suffrage. The strategy worked. At least in the short term, then, this litigation served to energize the voting rights movement, life was breathed into NWSA because of new members and donations and its reputation as a political force increased accordingly.[13] NWSA took these legal cases, knowing that they would lose, in order to put the issue of the right of women to vote into the public arena. Their goal was not to advance the case law, but to use the cases as a vehicle to give prominence to the issue and their organization. In fact, women's suffrage was not achieved until Amendment XIX to the Constitution, which gave women the vote, was ratified on August 18, 1920.

2. The Fight for Improved Working Conditions

The overall goal of the National Consumers' League (NCL), which became active at the turn of the century, was to improve conditions of employment for working women. Some states had passed minimum wage and maximum hours of work laws to protect women but many employers ignored these protective laws. NCL lobbied government agencies to enforce the existing legislation. When employers challenged the constitutional validity of these laws in order to avoid complying, NCL went to court to defend state protective labour laws which pertained to women only. NCL activity began in 1907 with the case of **Muller v. Oregon**[14] – a challenge by an employer named Muller to Oregon's requirement of a maximum ten-hour working day for women.

The counsel for NCL, Louis D. Brandeis, insisted on controlling the conduct of the case even though the state, which was the defendant, had its own legal staff.[15] As well, Brandeis pioneered the introduction of written evidence of a social, scientific and statistical nature at the appeal level which added to the facts introduced into evidence at the trial. This material was a compilation of evidence about physical differences between men and women; changed industrial conditions due to the introduction of machinery; the "bad effects" of long hours on women workers' health and morals, on job safety and on the health and welfare of future generations; the conditions in laundries (Muller had been convicted of requiring a female employee to work more than 10 hours a day in his laundry); and the reasonableness of the limit chosen (10 hours). This form of material is now referred to as a "Brandeis brief". It was the women on staff at NCL who developed the

material used in court by Brandeis. NCL was successful in persuading the Court to uphold the maximum hours of work law.

NCL did not consider the impact that such a brief would have on the courts' view of women over the long term. The marshalling of scientific or quasi-scientific information, which was outside the legislative history and not part of the original trial, was an important innovation in constitutional litigation. The basis for presenting such evidence was that it was "common knowledge" of which the court could take judicial notice. However, the brief's characterization of facts, adopted by the court, set forth a "common knowledge" about the nature of women which had disastrous results in the long run. Although NCL won that case and others which followed it, the sweeping language about male supremacy and the invocation of the allegedly numerous and fundamental differences between the sexes crystallized in the court record the prejudices of the age and have been used against women by courts in subsequent equality cases.[16] NCL may have won the battle to protect women in employment, but their short-term strategy caused grave difficulties in the long-term struggle for equality.

3. The Fight for Sex Equality

Litigation activity by the National Consumers' League spanned more than three decades from 1899 to 1935. At the end of that period, the National Association for the Advancement of Colored People was beginning to organize its litigation in the light of the lessons taught by NCL. The civil rights movement and the women's movement had a common interest in advancing the legal concept of equality because both thought they would benefit from the decisions. The interplay between the women's movement and the race movement had started early in the struggle for abolition and for the vote, and continued during the years before and after World War II. From 1935 to 1970, the United States Supreme Court established an interpretation of the Equal Protection Clause for race cases which survives with a few modifications today.

The Court developed a two-tier test for reviewing statutory distinctions or "classifications" as follows:

(1) In the higher standard for review, classifications considered "**suspect**" (e.g. race) or which infringed upon "fundamental rights" (e.g. privacy, freedom of speech, voting) were subject to **strict scrutiny** by the courts; to survive they must have furthered a **compelling** governmental interest and be **necessary** to the accomplishment of that goal.

(2) In the lower standard of review, classifications not inherently suspect (e.g. poverty, age) needed only be **rationally related** to a **permissible** governmental goal.[17]

Before women renewed their litigation efforts in the early 1970's, sex was subject only to the lower standard of review. For instance, the courts found that the gender classification was "reasonable" in cases such as **Hoyt v. Florida**,[18] a 1961 case in which the United States Supreme Court upheld the constitutionality of a Florida statute which excluded women from jury lists unless they took the initiative to register, but did not similarly exclude men. What rendered this distinction "reasonable" was the Court's continued acceptance of the traditional stereotypes as to the proper roles for women. In this case the Court stated that, despite the enlightened emancipation of women from the restrictions and protection of bygone years and their entry into many parts of community life formerly considered reserved for men, women were still regarded as the centres of home and family life.[19]

It became clear that women had not done as well as blacks, and it was partly in response to the different treatment of race and sex that the growth of women's law funds in the late 1960's and 1970's occurred. It became the primary goal of litigation to have sex declared a suspect category, and thus provide solid ground on which to attack gender distinctions made by government. That goal has not yet been achieved because the Supreme Court could not be convinced to take the critical step.

> The Courts' reflection of the race-sex analogy has had tremendous repercussions, both symbolic and strategic. It signaled that the war on sex discrimination was not going to be a lightning blitz, but rather a long drawn out struggle. The Burger Court was not going to do for women what the Warren Court had done for blacks, and the feminist movement was not going to be able to piggy-back on the civil rights movement to any great extent. It also meant that the

> women's rights advocates had to abandon a sweeping frontal attack in favour of a step-by-step operation.[20]

Instead, the Court has adopted a new intermediate classification test which is tougher than the test used for poverty or age, but it is less favourable than the strict scrutiny standard used for race. This intermediate test requires the government to show:

> (1) that the gender classification serves an important, rather than merely rational, governmental objective such as administrative convenience; and
>
> (2) that the classification is related substantially to the achievement of those objectives.[21]

Sex is the only category to be measured against the intermediate test.

So far the Equal Protection Clause of the United States Constitution has not given women the equality rights which they seek and the women's movement has been forced to expand its efforts. Women's attention has increasingly been focused on the political arena where their efforts have achieved the passage of remedial federal and state laws which are parallel to Canadian human rights codes and employment standards legislation. Women also sought to amend the United States Constitution to include the Equal Rights Amendment (ERA) which would have enshrined sexual equality in the Constitution. As we know, time ran out in this campaign, and the ERA was not ratified by enough states within the time allowed under the Constitution to become law.

Today, women's law funds are involved in a process of consolidation and reflection in terms of goals and organization. The future for successful litigation of women's issues may lie in restricting the number of legal areas to be litigated, for example to employment and reproductive rights issues, and in choosing courts favourably disposed to sexual equality, such as state courts where the state has more progressive legislation and a track record of progressive equality decisions.

C. A REVIEW OF WOMEN'S LAW FUNDS

In Chapter III of this report, we described the activities of advocacy groups in Canada and concluded that none of the present funds has participated in litigation on women's issues and that none of the advocacy groups litigating other legal issues was an appropriate model for a women's litigation fund.

We searched for organizations which have been successful in using litigation as a strategy for social change and visited with staff members of a number of American funds which are litigating equality issues for women. While our review of these funds is not exhaustive, we have attempted to include all of the nationally prominent women's law funds.

In the case of each of the funds, we considered its history, issue selection, structure, case selection and funding. Interestingly, most – if not all – of the funds model their activities on the pattern established by the NAACP Legal Defense and Educational Fund, Inc. Although that fund does not deal primarily with women's issues, it will be reviewed because of its importance as a source of ideas and as a standard for success.

The women's law funds vary from each other on many points despite their common model. The purpose of this review is not to analyse the day-to-day functioning of the funds but to offer some basis for drawing conclusions about how similar Canadian funds could best be organized. Although there are a number of ways to list them, we have listed them according to their scope. Thus, the first women's fund to be discussed will be the Women's Rights Project. It is part of the large American Civil Liberties Union, is national in focus and has a history of direct involvement in significant precedent-setting cases.

It will be followed by the National Organization for Women Legal Defense and Education Fund and the Women's Equity Action League. Both are affiliated with national membership organizations specifically concerned with women's issues.

Next, a number of funds which are not associated with national membership organizations will be discussed (sometimes they are described as "free-standing"). They are all non-profit corporations with tax-exempt status, a type of organization for which there is no Canadian equivalent. This type of organization is often referred to as a "public interest law firm". Not all public interest law firms are free-standing; for example, the NOW Legal Defense and Education Fund is not. The term is used to denote an organization which is not membership-based and, therefore, more closely parallels a traditional law firm. This group tends to be more regionally or locally oriented. Included are the Women's Legal Defense Fund, Inc. in Washington, D.C., the Women's Law Fund in Cleveland, the Women's Law Project in Philadelphia, and the Equal Rights Advocates, Inc. in San Francisco. Also included are two public interest law firms which, because of clear differences in their style of operation, cannot be grouped with the others. They are the Center for Constitutional Rights in New York City and the National Women's Law Center in Washington, D.C.

The League of Women Voters Education Fund has been included as an example of how an organization with specific goals can develop a specialized legal arm. Then we included two organizations – the National Center for Women and Family Law and the National Employment Law Project – which were designed to be centres of expertise or "back-up centres" in the federally funded American legal aid plan administered by the Legal Services Corporation.

Finally, an overview of the American Funds is used to draw conclusions as to which factors have contributed to the successful litigation of women's challenges to discriminatory legislation.

1. National Association for the Advancement of Colored People Legal Defense and Educational Fund, Inc. (NAACP LDEF)

In 1908, race riots erupted in Springfield, Illinois. A year later, as a result of public response to those riots, the National Association for the Advancement of Colored People was founded.[22] It was a membership organization supported by dues and small donations which saw itself as an educational and

lobbying group rather than a litigation organization. During the first 20 years of its existence, NAACP did very little litigation.

As a result of a sizeable grant from a private foundation (the Garland Fund) in 1930, NAACP was able to begin "a comprehensive campaign against the major disabilities from which Negroes suffer in American life – legal, political, economic." To further that end, the organization hired Nathan Ross Margold, a New York lawyer, to work out a legal strategy. The execution of that strategy has been detailed by Richard Kluger in **Simple Justice.**[23]

When NAACP started litigating in 1930, an earlier Supreme Court decision, **Plessy v. Ferguson,**[24] presented a legal roadblock to true equality. Plessy, a light-skinned black, was asked by a train conductor to move to a carriage for colored passengers. Plessy refused and was arrested. He then challenged the statute which required racial segregation on trains. In 1896, the Supreme Court ruled that racially separate facilities were lawful so long as they were equal, and that segregation was not discrimination.

NAACP's strategy was to choose winnable issues and then build on those cases by broadening the application of the law.[25] By winnable, lawyers mean a case where the facts are clear-cut and undisputed; where the legal issue is straightforward; and where a change in law fits in with advances in society's attitudes.

To carry out its legal strategy, NAACP hired three lawyers, Charles Houston, William Hastie and Thurgood Marshall. They began by attacking "restrictive covenants" – clauses in contracts which forbade the sale of land to blacks. This issue was chosen first because, by the 1930's, such a blatant form of discrimination was unacceptable both to the courts and mainstream American society. They were successful: the courts were not willing to lend their assistance to enforce racially discriminatory covenants.

The next step in the strategy to achieve equality was to bring forward cases where there was dramatic, uncontroverted evidence of inequalities between the white and black school systems in order to establish that "separate" facilities were not, in fact, "equal". Again, they were successful and courts ordered school

officials either to provide sufficient funds to the black school systems to bring them up to the same standards as the white systems, or to admit individual black plaintiffs to the white system because no equal black system existed.[26] The final step was to orchestrate a series of cases against school boards in different states challenging the established concept of "separate but equal". NAACP coordinated the trials and appeals of these cases, and brought them forward together to the United States Supreme Court. That Court made its ruling in **Brown v. Board of Education** in 1954, striking down segregation in American schools and in all public facilities, and declaring that separate was never equal. After 58 years of effort, the strategy was successful and **Plessy v. Ferguson** was no longer the law.

The incremental approach adopted by NAACP, whereby each slow step was the clear and logical extension of the preceding legal victory, proved an effective strategy to nullify potentially negative precedents, such as **Plessy v. Ferguson.** For NAACP to have jumped into litigation right from the outset with a **Brown v. Board of Education** type of case would probably have evoked the application of **Plessy** and sustained the separate but equal justification.

In 1939, NAACP created the NAACP Legal Defense and Educational Fund, Inc. as a separate legal entity in response to a tax ruling which effectively prohibited organizations with charitable status from lobbying. NAACP remained the politically active lobbying organization and the Fund, with tax-exempt charitable status, financed the litigation activity. The Fund maintained a close working relationship with NAACP until its break with the organization in 1957. Since then, the two organizations have been completely separate and there has been no overlap in membership or boards of directors.

The Fund was the first public interest law firm in the United States to develop a long-term litigation strategy and that is why it has been a model for all other civil rights organizations. It established, from the beginning, that it was not a service organization designed to handle all legal problems for blacks. Rather, it would concentrate all its efforts on one legal issue at a time, occupy the field in that area, and bring a series of cases to court concerning that issue. The Fund still dominates the field and is responsible for at least two thirds of the race litigation cases in the United States.

As early as 1935, NAACP, and later the Fund, had full-time staff lawyers (who never exceeded five in number until after the decision in **Brown v. Board of Education**) and a large central legal committee for consultation. They were able to keep abreast of relevant cases, monitor ongoing cases, and litigate selected cases. Staff lawyers have always conducted the cases from the trial level through to the appellate courts. The Fund has attracted excellent lawyers and receives assistance from academics in major law schools.

The Fund is unique in that it has been able to coordinate the efforts of race litigation in the United States largely because black lawyers have been a relatively homogeneous group. Historically, most United States law schools excluded blacks; aspiring young black lawyers could only receive their training at Howard University Law School in Washington, D.C. In addition, the exclusion of blacks from the American Bar Association until 1956 prompted the formation in 1925 of the National Bar Association which provided an exchange of information and skills on race litigation for its members. Black lawyers tended to concentrate in Chicago, Washington, D.C., and New York City, and hence had contact with each other through work, social activities, and the church.[27] The NAACP Fund established the Herbert Lehman Education Fund in 1964 and the Earl Warren Legal Training Program in 1972 to increase the number and skills of black lawyers and to provide special support for lawyers willing to devote a significant part of their practice to civil rights and equal opportunity issues, particularly in the South where black lawyers had not been available. In 1981-82, 500 black law students and lawyers benefited from these programs. As a result of the separation of this significant professional group, today, although blacks have entry to all law schools and black lawyers can become members of the American Bar Association, NAACP LDEF still occupies the field of race litigation and is able to control the cases brought to court.

The present Fund is a tax-exempt corporation which does not have a membership base. Its 75-member board of directors, 50 per cent of whom are lawyers, is appointed to achieve a balance of skills and representation including: legal advisers, prestige figures, business leaders, black community spokespersons, actors and academics. The board meets once a year; the five-member executive

committee meets once a month. The director of the Fund, Jack Greenberg, has been appointed for an indefinite term.

The 90-person staff includes 21 lawyers located in the New York City national head office, and three lawyers in the Washington, D.C. office, the lobbying arm of the organization. The Fund had offices in Atlanta, Jackson, and San Francisco but these were closed in order to increase flexibility in handling cases in all parts of the United States. Instead of having Fund offices in individual centres, a system of cooperating attorneys has been put in place across the United States.

These cooperating attorneys are lawyers in private practice, many of whom have been trained by the Fund, to whom the Fund refers cases and who, in turn, are a source of cases for the Fund staff. The cooperating attorneys, who are paid a modest fee while working on Fund cases, are an essential component of the Fund team. The Fund acts as a clearinghouse of information for its team and has an annual conference to keep them up-to-date on legal issues.

An important component of NAACP LDEF is the community outreach program, the purpose of which is to provide information to the public on the activities of the Fund and to keep the Fund informed of the current problems facing blacks. This function is seen as necessary because the Fund is not a membership-based organization.

As well as its litigation focus, with the recent widening of permissible activities for charities, NAACP LDEF is now involved in lobbying and education. For instance, the Fund was instrumental in the passage of the **Civil Rights Act**[28] of 1964. The Washington, D.C. office works with Congress and regulatory agencies to draft laws, regulations, guidelines, and to advance rulings which incorporate and reflect the concept of racial equality. In addition, this office monitors the performance of federal agencies in enforcing civil rights.

The litigation strategy of the Fund is to maintain a sharp issue focus. The cases are selected by the staff in consultation with outside lawyers and academics using the following criteria:

(1) the area of the law needs development;

(2) it is possible to accomplish change;

(3) the case fits in with the needs of the black constituency;

(4) it takes into account the existing community support system;

(5) the Fund takes into account what finances are available for the litigation.

There is no case review committee of the board of directors; the ultimate decision about which cases to take rests with the Director. Once a case is selected, staff lawyers provide the legal services and the Fund finances the expenses of the litigation, including court costs, travel, gathering of data and expert testimony.

The current areas of Fund litigation include: equal rights in public education, voting, employment and affirmative action; equal access to health care services and facilities; the end to capital punishment; prison reforms; police violence against minorities; and fair housing.

NAACP LDEF was one of the first litigants to use technical, non-legal or statistical data as evidence at trial. In establishing the basis for its findings in **Brown v. Board of Education** that segregated schools were inherently unequal, the Supreme Court cited findings of social scientists called as witnesses at trial by NAACP. The Fund and its staff have maintained close contact with academics who have published articles on racial equality in leading law journals. These academic writings have helped to legitimize the arguments on equality which Fund lawyers then make before the courts. In addition, NAACP LDEF has used well-timed publicity to further its cause. For example, on the day the **Civil Rights Act** came into effect, the Fund generated widespread publicity by filing 1,000 complaints of racial discrimination.

The 1981 budget for NAACP LDEF was $5.3 million. The expenses were: payroll, 43 per cent; expenses for the legal program (including court costs, travel, expert witnesses), 18 per cent; office expenses, 11 per cent; and scholarships,

11 per cent. The balance of the costs arose from fundraising and public education.[29]

Fund monies are raised from a variety of principal sources. In 1981, for instance, foundations provided $1.87 million (some of the donations were for specific projects and others for general litigation). The Fund received contributions for general litigation from the Rockefeller, Ford, and Carnegie foundations. Corporations donated $0.6 million, individuals $2 million, and the Fund received $0.5 million from court-awarded fees, that is, costs in cases where the Fund was successful in litigation. In the same year, the Fund spent approximately $1 million in order to raise its funds.[30] NAACP LDEF policy is not to solicit any general government funds for fear that the government might hold it to ransom at some future time. Of all the funds studied, NAACP LDEF has the broadest and most secure base of funding. The individual contributions received by NAACP LDEF, its prominence in the area of race litigation, its longevity in this field, and its successful track record make the Fund an attractive and stable recipient to foundations and corporations.

NAACP LDEF is an admirable model for any women's legal action fund. To be sure, its position and prominence cannot be replicated overnight.

2. Women's Rights Project of the American Civil Liberties Union (ACLU WRP)

In 1971, the American Civil Liberties Union agreed to represent Sally Reed, an Idaho widow, before the United States Supreme Court. Reed had lost before the Idaho courts in challenging a state law establishing that men were automatically to be preferred over women in the selection of administrators of estates.[31] The Supreme Court, in a unanimous landmark decision that prompted a decade of growth in women's litigation, held that sex, like race, was a classification subject to judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[32] In this case, mere administrative convenience was not enough to save the provision from being struck down. Until the decision in **Reed v. Reed Administrator**, there had not been a case where a law was struck down because it discriminated on the basis of sex or gender.

ACLU responded to this victory by following up on a 1969 resolution made by its board of directors and establishing the Women's Rights Project (in New York City) to undertake activities which would consolidate and expand constitutional protection of women's rights.[33] The goal was clear: to have sex discrimination awarded the same high degree of judicial scrutiny as race discrimination. The ACLU board of directors committed $50,000 of its general funds to create the Project. One full-time lawyer was hired, and ACLU donated space, clerical support and library facilities.

Up to this time, race issues had overshadowed women's rights under ACLU. Formed in 1920, ACLU had its roots in the defence of wartime dissenters and conscientious objectors. Although feminists were active in its formation, it was not until 1944 that the Committee on Discrimination Against Women in Employment was formed; it later became the Committee on Women's Rights. This committee survived for 10 years and then merged with the Race Relations Committee to become the Equality Committee. In response to the civil rights movement, the emphasis of that committee shifted dramatically to race discrimination.[34]

WRP quickly became, and is today, a significant player in women's litigation in the United States. Since its creation, it has handled more sex discrimination cases than all other women's organizations combined.[35] It is not just the volume of cases that is impressive. Unique among other women's rights organizations, it employs the systematic, incremental precedent-setting approach to litigation which was pioneered by the NAACP Legal Defense and Educational Fund, Inc. Its priorities, however, have taken some twists and turns since 1971.

Its initial priorities, broad in scope, were to challenge specific gender-based discrimination under the law and to establish legal recognition of women's unique role with respect to childbearing and thereby to eliminate discrimination based on pregnancy.[36] Throughout the early years of WRP, a variety of cases was undertaken, particularly with respect to discrimination in social security, the military and jury selection. Real victories were attained in these areas.

In 1973, WRP participated as co-sponsor in another landmark case on equal protection decided by the United States Supreme Court. A law providing that

husbands of servicewomen (and not wives of servicemen) must pass a spousal dependency test in order to be eligible for certain benefits was struck down in **Frontiero et vir. v. Richardson, Secretary of Defense, et al.**[37] The real significance of the decision was that the Supreme Court came within one vote of declaring sex to be a "suspect classification" which, like race, would be subject to strict scrutiny in every case. The goal appeared to be within view and WRP was able to attract new resources and grow. In 1975, it received a grant from the Ford Foundation of $150,000 to be used for the salaries of four lawyers and two secretaries. At that time, WRP focused on employment discrimination, and cases were taken involving a wide range of jobs, from waitress to professor.

The goal of eliminating discrimination on the job remained elusive, however, and it became clear that, for a number of reasons, WRP and other groups litigating women's rights would have to reassess their strategy. First, an increasingly conservative Supreme Court backed away from treating sex like race under the Fourteenth Amendment. Other routes and other remedies to prevent sex discrimination would have to be used and refined. Second, sources of funds were decreasing (both in number and in the total amount of money available) while costs were rising because of inflation and increasingly sophisticated and complex responses from defendants (usually government or corporations). Third, as more groups became involved in litigating women's rights, competition for those funds increased. As well, the burgeoning number of new groups resulted in duplication of services. In the face of these factors, WRP adopted a narrower focus with the hope of greater success. Under Isabelle Katz Pinzler, director since 1979, WRP has selected the following issues:

(1) employment discrimination against women of child-bearing capacity;

(2) non-traditional employment:
- the blue-collar trades,
- military and para-military careers;

(3) fringe benefits, pensions and insurance.

The common element among these issues is that they all involve "facial" discrimination, that is, distinctions made because of those characteristics of women

which are identifiable and immutable. This focus is consistent with WRP's concern with sex stereotyping. Other issues such as pay equity are recognized as important but not winnable at present. As well, WRP takes cases to establish rights rather than to enforce existing rights.

As one working unit of a much bigger whole, WRP, with its operations which include case selection, is closely linked to ACLU.[38]

WRP, a non-profit corporation with tax-exempt status, receives five or six requests each day for legal services. The legal staff decides which cases have potential, collects the information and prepares a legal memorandum for the litigation subcommittee. The litigation subcommittee does not meet often but instead reviews potential cases by mail. Alternatively, the litigation subcommittee or the legal staff may identify an action which should be brought, and the legal staff then approaches the appropriate individuals who may wish to be plaintiffs in the action. WRP selects cases which raise issues it has selected as priorities and which meet the following guidelines:

(1) the issue is novel and of national importance for poor, minority, working or older women;

(2) the apparent sex discrimination seems provable;

(3) a victory is likely if the case is well handled;

(4) the issue is the next logical step in the development of the law;

(5) it is not a case where a loss would be so damaging to the development of the law that it is not worth the risk;

(6) large numbers of women will benefit, directly or indirectly, from the decision;

(7) the client would not be able to find a lawyer to represent her if WRP did not take the case.[39]

WRP prepares a report for each calendar quarter which describes the status of cases in which it is involved. The cases are spread from coast to coast. In over one half of the cases listed in the report for the first quarter of 1982, it acted as counsel or has shared those duties with other lawyers who are on the staff with

ACLU or who are volunteer lawyers with ACLU. In this way, WRP functions as part of a much larger legal network.

WRP makes extensive use of lawyers in ACLU affiliates. A two-way relationship exists: cases are referred to WRP by officials and vice versa. When an affiliate works on a case accepted by WRP, disbursements but not legal fees are paid by WRP. Affiliates may undertake women's cases without the participation of WRP; the only obligation is that if an affiliate decides to appeal a case, it must file a copy of the appeal with the national office before it is filed with the court. Major problems can arise with this system; for instance, an affiliate may take on and lose a case, thereby interrupting a series of cases which were expected to build towards a desired conclusion. WRP occasionally uses volunteer lawyers outside the affiliates and sometimes disagreements arise over the conduct of a case. In addition, WRP has strong ties with law schools in New York City and students there undertake much of the legal research.

WRP was involved as **amicus curiae** in fewer than one quarter of the cases listed in the first quarter report for 1982. In the great majority of cases, it was acting as counsel or co-counsel. In a few cases, it assisted in some less formal way, such as helping a complainant complete papers to be filed in an administrative matter or by suggesting appropriate data and expert witnesses.

In addition to its litigation activity, WRP monitors bills in Congress, comments on proposed legislation or guidelines and testifies at congressional hearings. It participates with other women's groups in the development of priority issues and assists in public education through speaking engagements and publications. It also prepares articles for publication in legal journals.[40]

Although WRP's initial funding came from its ACLU parent, it has raised its own funds since 1975.

WRP's income in 1982 was approximately $265,000, almost all of which was raised from the following sources: Ford Foundation ($200,000); other foundations ($43,000); and court-awarded costs ($20,000). Its expenditures were estimated as follows: salaries (three lawyers, one public educator, two

secretaries) – 67 per cent; litigation costs – 11 per cent; contribution to ACLU overhead – 7 per cent; postage and telephone – 5.6 per cent; and rent – 4.5 per cent.

3. NOW Legal Defense and Education Fund (NOW LDEF)

The National Organization for Women, the largest United States women's group, is a membership organization founded in 1966 as an outgrowth of the women's movement.[41] The original purpose of NOW was to take action in order to bring women into full participation in the mainstream of American society, so that they could exercise all community privileges and responsibilities in a true, equal partnership with men. NOW believes that women should receive the means to improve the condition of their lives.[42] It has been active in lobbying on behalf of women's rights and was instrumental in the push for the Equal Rights Amendment to the American Constitution.

In 1970, NOW established the Legal Defense and Education Fund to provide legal and educational services to eradicate sex discrimination and ensure equal rights under the law and full participation in society for all women and men.[43] The Fund was established as a vehicle to raise tax-exempt money for work on equality rights because the income tax laws at that time required a separation between the membership group and the Fund.

The Fund is a national, tax-exempt membership corporation consisting of 40 members. There are 19 persons on the board of directors, five of whom are lawyers chosen for their particular expertise. Three top officials of NOW serve as **ex officio** officers of the Fund. A litigation committee of the board establishes the priorities of the Fund.

The Fund's head office is located in New York City and it has local chapters across the United States. The office staff has grown dramatically since 1979 when there was only one lawyer. Today there are 15 employees including an executive director, an office manager, controller, three fundraisers, four lawyers and three support staff. In addition, the Fund has two intern positions for law students.

Before NOW LDEF was established, NOW members participated in several important employment discrimination and education cases in the American courts. Today, although the Fund has few resources for litigation, NOW LDEF is involved in a full range of women's issues with particular emphasis on legal issues relating to family and education. There is no limit or specialization in the litigation activities. The Fund has a limited lobbying role and appears before congressional committees to give evidence and submissions when invited. In addition, NOW LDEF prepares written comments for administrative boards with the goal of influencing the way legislation and regulations are written and interpreted.

NOW LDEF has a number of specific projects for which it receives restricted or "tied" funding.[44] In these projects, as a condition of the grant, the donor requires that the money be used only for the specific project. These projects include the following:

(1) The Project on Equal Education Rights (PEER): located in Washington, D.C., it is a specific project to eliminate sex discrimination in elementary and secondary schools. PEER receives funding from government, the Carnegie Corporation, the Ford Foundation, and the Rockefeller Family Fund. PEER does not undertake litigation but NOW LDEF takes cases which arise out of PEER activities.

(2) The State ERA Project: funded by the Ford Foundation, it develops principles of sex equality within the structure of state constitution equal rights provisions. This is an educational and informational project and does not undertake litigation.

(3) The Arbitration Project: funded by foundation grants, it studies alternatives to litigation for the resolution of employment discrimination disputes.

(4) The National Judicial Education Program: supported by foundations, it was established with the goal of eliminating sex-based stereotypes, myths and biases in judicial decision making. Materials prepared by this program are used in judges' education programs across the United States.

(5) The Media Impact Project: it seeks to improve opportunities for women and minorities in broadcasting.

NOW LDEF's litigation activities have been limited because it has received little money for litigation. In 1982, the Fund was involved in 20 cases, 18 at the appeal court level; two cases were handled by Fund lawyers and the rest were conducted by volunteer lawyers. In other cases where the Fund does not have control of its litigation, the Fund reviews pleadings and provides legal research and advice on strategy to litigants and their lawyers. NOW staff and volunteer lawyers also prepare **amicus** briefs on issues important to women which are before appellate courts. In other cases, NOW LDEF lends its name and support to briefs filed by other women's organizations.

Again, because of funding limits, NOW LDEF is unable to provide lawyers to women plaintiffs. Instead, NOW LDEF acts as fiscal agent or trustee for plaintiffs to assist them in raising funds for their own litigation. This permits women litigants to use the tax-exempt status of the Fund. However, funds raised in this manner may be used only for disbursements such as photocopying, witness fees, and expert testimony; no money received can be used to pay lawyer's fees.[45]

NOW LDEF receives requests for case representation from all over the United States. The staff does an initial screening process based on case selection guidelines established by the board of directors. A staff lawyer is assigned to each selected case; she tries to find a volunteer lawyer who will assume responsibility for the case. A case memorandum is prepared which outlines the facts, the legal issues involved and the chance of success. This memorandum is taken to the litigation committee of the board of directors for approval. The process usually takes four to five months. If the Fund does not take on the case, the request is referred to other organizations.

The 1981 budget for NOW LDEF was $2.1 million of which 43 per cent was spent on salaries.[46] There are three staff members and a consultant assigned full time to fundraising. The Fund receives two types of contributions:

(1) funds from foundations which are given for specific projects and must be used only for the purposes given;

(2) general or unrestricted funds, usually from individuals and corporations, which may be used for any of the Fund's purposes.

Seventy-two per cent of the money received was tied or restricted to specific projects and not available for general litigation. NOW LDEF recently started a direct mail campaign to raise funds from the public at large. The response has been encouraging. In 1980, the Fund received contributions for general use from 75 corporations. The process of raising funds, obtaining grants from foundations and renewing project grants is very time-consuming. It appears that individuals prefer to contribute to the political activities of NOW such as the ERA campaign rather than to the Fund. It may be that this high-profile political campaign was seen as having an immediate impact on women. Nevertheless, NOW members remain the Fund's most loyal funding source.

The membership organization, NOW, is the Fund's major client. That is, NOW defines the issues for the Fund and decides which projects will be pursued. The Fund is unique among other women's organizations doing litigation because of the large membership of NOW, to which the Fund is responsible and accountable. NOW's broadly based membership gives the Fund staying power which is significant in fundraising from individuals and corporations. However, the reputation of the Fund also goes up and down with that of NOW. In spite of the parent's size, NOW LDEF has not been as active in litigation as other women's funds such as the ACLU Women's Rights Project. The Fund hopes to increase its litigation activity and make it a priority. The key to long-term success for NOW LDEF will be the establishment of a broad base of funding and a stable, continuing source of unrestricted funds.

4. Women's Equity Action League (WEAL)

The Women's Equity Action League is a more conservative legal action fund than NOW LDEF; its strength is in being a more traditional lobbyist of the federal government on behalf of women's issues. WEAL was founded in 1968 by women who broke with the National Organization for Women (NOW) because they disagreed with some of NOW's positions, including the 1967 decision to make the repeal of the abortion law part of NOW's official program. Its members tend to be older than NOW members and to come from the professions.[47] The founders of

WEAL were upset by the militant tactics used by NOW.[48] As a result, WEAL members who choose to participate in rallies are not permitted to use the WEAL banner. The original objectives of WEAL were the attainment of equality, the full enforcement of existing laws, the passage of anti-discriminatory legislation and the encouragement of individual self-improvement to prepare women for more rewarding jobs than they had in the past.

In 1972, WEAL Fund, a separate organization, was established to be the litigation arm of WEAL in order to comply with the tax law which at that time prohibited the use of tax-exempt funding for lobbying. When the tax laws were changed in June 1981, WEAL Fund was merged with the WEAL membership organization. The new entity is a national non-profit, tax-exempt organization with 6,000 members who are permitted to vote at the annual meeting if they have paid the annual dues. The members elect a fifteen-member board of directors for a two-year term. One third of the board members are practising lawyers.[49]

WEAL's national office is located in Washington, D.C., and has a staff consisting of an executive director, a lawyer, twelve other support staff, and from seven to fifteen law student interns. The board of directors determines the priority of areas of interest which have included: employment, pensions and social security, education equity, women in the military and women in athletics. WEAL has brought administrative charges of sex discrimination against 300 colleges and universities and has investigated major foundations and fellowships for sex discrimination in scholarships and grants. It was one of the groups active in persuading the directors of the Rhodes Trust to open that prestigious scholarship to women.[50]

A full-time lobbyist is employed to monitor proposed legislation and regulations and make presentations before Congress and its committees. The interns keep track of the hearings of congressional committees and relay this information to other women's groups across the United States.

WEAL has developed an expertise in women and athletics. Its Sprint Program provides information to lawyers and the public on equality of opportunity in athletics for women and publishes a newsletter called **In the Running.**

A clearinghouse for information on women and the military was set up by WEAL with funds received from the Ford Foundation. It gathers legal cases and data on education, job training and career opportunities for women in the military so that advocacy groups can use this information to lobby for changes in women's entry and participation in the armed services. This information, contained in kit form, is available for distribution across the United States.

WEAL has been persistent in the pursuit of its goals. Although the organization and its members filed 300 charges of sex discrimination in education between 1964 and 1974, for years nothing was done about these complaints by the Department of Health, Education and Welfare which had responsibility for implementing the education provisions of Title IX of the **Civil Rights Act.** As a result, in 1974 WEAL hired lawyers to sue the Department for not enforcing the **Civil Rights Act.** In 1977, a consent decree imposed timetables for enforcement on the government.[51] When those timetables were not met, WEAL went back to court for enforcement of the order.

Although WEAL would like to help litigate individual cases, it neither supplies nor recommends lawyers. In an existing lawsuit, the woman plaintiff may apply to WEAL for fundraising assistance. The case is reviewed by the staff and taken to the legal committee of the board of directors for approval. If the case has merit and is in an area of priority established by the board, WEAL may adopt the case as its own. This means that the woman litigant can raise tax-deductible contributions which can be used to pay for the litigation expenses, although not the lawyer's fee. WEAL acts as a conduit for the money raised, permits its name and letterhead to be used in the fundraising appeals and charges 10 per cent for administrative costs.[52] WEAL receives approximately 300 inquiries a year concerning ongoing litigation, but only 25 cases formally apply to WEAL. Most of these receive approval from the board.

The organization offers technical assistance to lawyers and litigants in cases concerning sex discrimination in athletics and employment in higher education.[53] Data to establish discrimination is extremely expensive to gather and WEAL makes it available to litigants in such cases. It assists lawyers in drafting the pleadings and in researching the case law. If WEAL wishes to prepare **amicus curiae**

briefs in women's issues cases before the Supreme Court, it retains lawyers to act on its behalf. WEAL expects to receive those services free and also receives donations of clerical services and office expenses. As well, WEAL lends its name and support to briefs prepared by other groups on women's issues.

The 1982 budget for WEAL was $400,000, fifty per cent of which was used for staff salaries. WEAL's executive director is responsible for fundraising and there is one other staff member who is allocated to this task on a full-time basis. WEAL receives funds from the following sources: 25 per cent from individual contributors and corporate donors; 50 per cent from foundations; 25 per cent from the government.

The money received from foundations is tied to a particular project, such as the Sprint Program, and cannot be used for general administrative expenses. A great deal of time and energy is devoted to obtaining funding. WEAL needs secure and long-term funding which is not tied to specific projects. Up to now, WEAL's litigation efforts have been severely limited by a lack of funds. Staff hired for specific projects are laid off when the funding comes to an end. There are limited sources of funds for women's issue litigation in the United States, and the obtaining of grants is an all-consuming pressure and concern for WEAL.

WEAL has succeeded in that it has focused its energies on lobbying the federal government on behalf of women. The composition of its membership has dictated its issue concerns: education, the military and sports. In these areas, WEAL excels as a source of information and expertise.

5. Women's Legal Defense Fund, Inc. (WLDF)

In 1971, thirty-five women lawyers who were practising law in the Washington, D.C. area incorporated the Women's Legal Defense Fund, Inc., a charitable, tax-exempt organization devoted to securing equal rights for women through education, litigation and counselling.[54]

WLDF was the creation of feminist lawyers who were prepared to act as volunteer lawyers in worthy cases in the metropolitan Washington area and, from

1971 to 1974, it operated without paid staff. In 1974, with 85 members, WLDF received $30,000 seed money from the Junior League which it used to retain its executive director and an assistant.

While women residents of Washington, D.C. share the same day-to-day problems as other women, they also reside in the nation's capital, the seat of all federal policy making in the United States. As a result, the WLDF serves two functions which sometimes seem to create an odd combination.

It provides both counselling and legal services to local women on a broad range of issues including: employment discrimination; discrimination in insurance; domestic relations, custody and family property; credit discrimination; name changes; cases involving lesbians, women of colour, displaced homemakers and older women; and cases involving the enforcement of occupational health and safety laws.

Each time a woman goes to WLDF for assistance, a decision is made as to which services are appropriate. Sometimes, after initial contact with a woman, it may be possible to refer her directly to a lawyer in private practice chosen from among those listed in a referral bank. If she cannot be referred, a decision must be made as to whether her problem can be addressed by counselling. WLDF maintains four counselling committees, all staffed by qualified and selected volunteers from a number of disciplines, in the areas of employment, domestic relations, credit and name changes. It also maintains a pool of lawyers who can assist in a domestic relations emergency.

A request for a lawyer must be placed before the screening committee by the executive director. The screening committee meets monthly to consider the request. WLDF sometimes accepts cases where sex discrimination is not involved. In every case, however, the steering committee considers whether, in legal terms, a successful result will advance equality principles and to what extent, in practical terms, women will be served by a change in the law. Like the other women's law funds, WLDF seeks to identify cases of the greatest value to most women. The steering committee also considers whether the woman could pay for services and whether the anticipated costs and required expertise can be provided by WLDF.

Acceptance of a case by WLDF is contingent upon the availability of a volunteer lawyer. It is the responsibility of the executive director to find a volunteer lawyer and the solicitor-client relationship is with this lawyer, not WLDF. Each case to which a lawyer is assigned is monitored by both a member of the screening committee and a staff lawyer. A lawyer cannot accept legal fees unless they are awarded by a court or an administrative agency or agreed upon in the course of a settlement. All disbursements are the responsibility of the client. In order to protect the tax-exempt status of WLDF, both the lawyer and the client are prohibited from undertaking any lobbying activity in the course of the matter.

In addition to all its litigation activities, WLDF runs "My Sister's Place", a shelter providing services for battered women.

WLDF is committed to presenting a feminist voice in national policy before courts, Congress and federal administrative agencies and has adopted a number of strategies for achieving this goal. It has a history of involvement in important cases as **amicus curiae**, in some cases undertaking the preparation of the brief and in others signing a brief prepared by another organization. On June 30, 1980, the volunteers' caseload was 57 cases; in nine of these cases WLDF was acting as **amicus curiae**. The docket has been as high as 80 cases. In one year, WLDF may receive 5,000 calls, 3,000 of which are referred to the domestic relations counselling committee.

Although its tax-exempt status prevents it from doing significant amounts of lobbying in Congress, WLDF is very active as an expert witness and as a source of expertise in rule making to Congress or federal administrative tribunals such as the Equal Employment Opportunity Commission. WLDF has also tried to provide leadership in ensuring that women receive appointments to the judiciary as well as to executive and legislative bodies. It is active in providing information to the press. WLDF, because of its Washington location, is at the centre of an extensive network of women lawyers throughout the United States who can move on national issues. Its staff lawyers, in addition to supervising cases accepted for litigation support, can develop expertise about the federal system and national policy issues and with that expertise WLDF can serve as a clearinghouse for information.

WLDF is managed by a board of directors which has between 15 and 21 members; not more than two thirds of the directors can be lawyers and one half must be residents of the metropolitan Washington area. The board meets quarterly. The three important committees of the board – the steering committee, the executive committee and the screening committee – all meet monthly. Staff members cannot sit on the steering committee.

Apart from the executive director (who must be a lawyer), there are two staff lawyers who work primarily on employment issues in the Equal Employment Opportunity Monitoring Project and the Pregnancy Rights Project. A law clerk operates the Emergency Domestic Relations Project. Information to the legal and lay community is provided by a community education officer. An administrative director handles the tasks associated with running an independent membership-based organization including: accounting, personnel, internal procedure, membership services and direct mail fundraising. In fact, the administrative director devotes 40 per cent of her time to fundraising. The full-time staff also includes an office manager, a filing clerk and a receptionist. There is a large part-time staff which includes undergraduates and law students serving internships for academic credit.

In 1980, WLDF's program services cost $142,421, the price of support services totalled $53,890 and fundraising costs amounted to $10,174. The principal sources of income for WLDF (apart from the Shelter) were foundation grants ($124,532); contributions, legacies and bequests ($26,867); memberships ($15,066); and government grants ($1,250). Total revenue was only $170,750, resulting in a deficit in 1980. All of the foundation and government grants were restricted or "tied" funds.

Three projects – equal employment opportunity, pregnancy rights, and emergency domestic relations – have received foundation funding which cannot be used for providing litigation services. In these projects, the staff of WLDF has been involved in public commentary, court testimony, public speaking, the production of publications and liaison with other groups.[55] In these three areas, WLDF is a resource to the local and national community and an advocate for progressive change.

The long-range planning report of WLDF has set goals for expansion over the next few years. These plans include the development of a litigation fund to support staff lawyers who would undertake litigation, the assembling of a nationwide referral list of lawyers and a drive to increase membership to 10,000 nationwide. WLDF, in short, sees itself as a growing national organization rather than as one content to press forward at the local or regional level. Without a doubt, its proximity to the national seat of government – and the importance to the women's movement of having strong voices there – has propelled it to expand. What should not be lost sight of, however, is that historically, WLDF matched local needs with the local talents of women lawyers who were prepared to make a contribution to litigation on behalf of women.

6. Women's Law Fund, Inc. (WLF)

The Women's Law Fund, Inc. was incorporated in January 1972 by Jane Picker, a law professor, who had earlier been active with the Women's Equity Action League and other groups.[56] It is a non-profit corporation with tax-exempt status based in Cleveland and serving the state of Ohio. Despite its regional focus WLF has had a national profile since an early date because its first case, **Cleveland Board of Education et al. v. La Fleur et al.,**[57] went to the United States Supreme Court. In that case, the Court invalidated the mandatory maternity leave policies of a school board which required that pregnant teachers leave the classroom four months before their due date.

WLF provides legal services in the cases it selects. Although it sometimes deals with cases involving clients who reside outside Ohio, WLF primarily handles cases involving state residents which present issues of national significance. Such cases constitute about two thirds of its caseload. As a result, it is neither a national organization like the Women's Rights Project of ACLU, nor a local one like the Women's Legal Defense Fund, Inc.

Although employment discrimination is the primary focus, WLF has also taken cases involving government benefits, education in and outside the classroom, women in athletics and law enforcement and the extension of women's constitutional and statutory protections outside the United States.

Criteria for accepting cases include:

(1) the importance of the issue to women;

(2) the number of women to be affected; and

(3) the need to settle the issue in order to build a legal base or precedent which would be useful in the litigation of related issues.

If a case is centred in Cleveland, it is handled by one of the three staff lawyers, but if it originates outside Cleveland, it is handled by a staff lawyer and a local agent who is paid disbursements. The local agent is responsible for keeping track of the time expended on the case so that if costs are awarded, they are divided between WLF and the local agent. WLF does participate in cases which simply enforce existing laws; many of these cases are settled before litigation is started or completed. As a measure of WLF's success, at least $1 million in benefits have been distributed to individual women in employment discrimination cases it has handled.

WLF's total annual budget is $250,000. It was the first women's law fund not associated with a membership-based organization to be supported by the Ford Foundation. Today, it is also supported by local foundations and donations from organizations and individuals. It has received government and university funding to support a sex discrimination teaching clinic in conjunction with the College of Law at Cleveland State University. Like the other women's funds, it participates in educational programs and provides technical and expert witness assistance to other organizations and individuals.

7. Women's Law Project (WLP)

The Women's Law Project, based in Philadelphia, is a Pennsylvania non-profit corporation with tax-exempt status.[58] It opened its doors on April 1, 1974. Direct service to Pennsylvania women is a high priority in all of WLP's activities. Its three-member legal staff has undertaken test case litigation involving health, reproductive freedom, employment, domestic relations, housing, insurance, credit, and education.

WLP has developed special expertise with respect to the interpretation of equal rights provisions contained in state constitutions. Unlike the Canadian provinces, most (if not all) states have constitutions governing matters within state jurisdictions. While American women were fighting to have an amendment guaranteeing equality rights made to the United States Bill of Rights, they were also lobbying to have a similar provision added to each state constitution so that all citizens could be protected from sex discrimination. Pennsylvania was one state where women were successful in obtaining such an amendment in 1971. WLF published a book on the impact of state equal rights amendments on state laws, earning it a national reputation for expertise in the meaning and impact of such amendments.

WLP is now involved in litigation using the Pennsylvania amendment to challenge sex-based laws and practices. Litigation strategy is planned with the idea that any positive results obtained in Pennsylvania may well influence the decisions of courts in other states. This litigation activity is one component of a bigger project, undertaken jointly with the NOW Legal Defense and Education Fund, designed to generate and disseminate information on state equal rights amendments.

The group also undertakes extensive public education and media appearances which focus on women's rights. It offers legal representation and in-house training programs for non-profit women's organizations and telephone counselling (responding to 4,000 calls per year) for individual women with sex discrimination complaints. As well, WLP participates in the Pennsylvania Judicial Selection Project (a screening group for the selection of judges in the state), and provides information and advice on women's issues to the Pennsylvania state government.

WLP has three staff lawyers (including a managing lawyer), paid and volunteer administrative staff and students. In 1980-81, WLP's revenue totalled $187,550. About $78,000 was derived from court-awarded costs. Another $58,000 was tied funding from national foundations to be used for the litigation component of the State ERA Impact Project. The remaining funds were derived from local foundations, United Way individual contributions and teaching.

8. Equal Rights Advocates, Inc. (ERA)

Shortly after graduating in 1972, three young California lawyers – Wendy Williams, Mary Dunlap and Nancy Davis – decided to form a public interest law firm.[59] They incorporated the Equal Rights Advocates, Inc., based in San Francisco, as a non-profit corporation with tax-exempt status. However, public interest law does not normally generate enough income to pay for litigation activities and the three also found that they could not immediately raise funding from foundations because they did not yet have a proven track record. As a result they shaped ERA into a teaching law clinic. Funding for that purpose was easier to get and the Carnegie Foundation, the San Francisco Foundation and other local foundations helped to launch the clinic. Ten or twelve law students at a time were enrolled in a clinical program which was equivalent to a semester's instruction at law school. The main purpose of the clinic was to give students experience in handling women's issues. The program included case simulation, active participation in ongoing cases of the firm and discussions with principal players in cases and the legal system generally. At the same time, the ERA functioned as a public interest law firm. By the end of the 1970's, however, foundation funding was no longer available for the clinic and the law schools could not afford that type of clinical education. As a result, ERA lost its only secure funding and now functions only as a public interest law firm.

Like other women's law funds, ERA is responsive to a broad range of issues involving sex discrimination which are brought to it by women in the San Francisco area. A two-step screening process is used in the selection of cases. Staff lawyers make the first selection and these cases then go to a litigation committee (comprised of three lawyers, one of whom is a specialist in sex discrimination) which meets quarterly. The committee assesses each case on the basis of the number of people it would affect and whether the outcome will advance the law. Where the law is already clear and the case is a solid one, ERA will usually refer the individual to another organization or provide information for self-help.

If a case is accepted, the work is undertaken by staff lawyers. ERA does not currently have a system of volunteer lawyers to rely on, although occasionally

private law firms donate time on a **pro bono** basis. In both situations, control by ERA of the case is viewed as essential.

Occasionally, ERA will attempt to raise funds for disbursements for litigation. ERA rarely intervenes in a case by preparing an **amicus curiae** brief, but at times it will sign an **amicus** brief prepared by other women's law funds or civil liberties organizations.

ERA does not devote staff time to lobbying, although it does occasionally appear before regulatory bodies to comment on proposed rules. However, the firm does educate local women on legal issues. It tries to inform women of their rights and at the same time looks to them for continued support of the firm. To that end, brochures and a quarterly newspaper are published and each lawyer on staff has about one speaking engagement per month. Staff lawyers continue to teach at law schools in the San Francisco area.

At its inception, ERA had four staff lawyers. As a result of financial constraints, the staff now consists of two full-time and one half-time lawyer; one of these lawyers acts as the director. In 1981-82, expenses ran so far ahead of revenue that most of the staff members were paid half salary for the year. ERA faces a chronic shortage of funds as it does not have a membership base or foundation support. Like most other law funds, ERA, by virtue of its non-profit status and United States tax rules, cannot accept payment for its services except for those costs which may be awarded under certain statutory provisions at the end of a successful case.

Currently, the director is doing most of the fundraising. In an interview with the authors of this study, the director stressed the need for diverse sources of funds and the importance of having a full-time fundraiser working in conjunction with an active board whose members give their time and add prestige to the organization.

9. National Women's Law Center (NWLC)

In 1972, the National Women's Law Center was founded in Washington, D.C.,[60] as the Women's Rights Project of the Center for Law and Social Policy. It became a free-standing public interest law firm under its current name in July 1981. Like other public interest law firms, NWLC's activities encompass a mix of litigation and advocacy, monitoring and education. It concentrates on education, employment, health, insurance, and the particular problems of poor women and women in the Third World.

The orientation of NWLC's activities, like that of the Women's Legal Defense Fund, Inc., arises from its location and its proximity to federal institutions. To a greater extent than other women's law funds, it focuses on cases which will ensure better implementation or enforcement of federal laws and policies. An example is the case of **Women Working in Construction v. Marshall** and **Advocates for Women v. Marshall.**[61] NWLC acted as counsel to the plaintiffs, both of whom sued the Secretary of Labor for failing to demand goals and timetables to remedy sex discrimination in the construction industry (existing federal rules imposed mandatory affirmative action to be undertaken by the private sector when working on government contracts). Under the terms of the settlement reached in December 1979, the private sector had to establish goals and timetables and the Department of Labor was required to set up a monitoring committee to review implementation of the regulations and reporting requirements. The Department of Labor is now considering whether to ask the court to set aside its order. This type of case is undertaken in order to ensure that, in practical terms, rights which are accorded to women are energetically implemented.

As in the case above, NWLC often acts for organizations or groups of individuals who share a problem. This is particularly effective in cases involving the enforcement of existing rules or laws because a general remedy is usually appropriate and it can be illustrated that breakdowns in enforcement affect many people. NWLC does not have a regional or local focus; its cases are being heard in federal courts in many parts of the United States.

NWLC also actively monitors law reform. For instance, in addition to the case on goals and timetables for affirmative action in the construction industry, it led a coalition of women's, civil rights and labour groups in filing comments with the federal Department of Labor on proposed changes which might eliminate the requirement to include goals and timetables in affirmative action programs. In its lobbying activity, the Center usually tries to build a coalition of interested groups to speak on the matter, and then provides "legal back-up" to the coalition. In this way, although it does not have a membership base, the Center can speak for a larger number of people and make a greater impact.

The National Women's Law Center, a non-profit corporation with tax-exempt status, employs four attorneys with funds from the Ford Foundation.

10. Center for Constitutional Rights (CCR)

In 1966, a group of civil rights activists founded the Center for Constitutional Rights. It was intended to be a more spontaneous and responsive legal organization than either NAACP or ACLU, the two largest rights organizations. Generally, CCR aims for collaboration between "grassroots" or community movements and lawyers.[62]

In fact, CCR draws its staff (both legal and non-legal) from those who are active in various community movements. In that way, the staff members provide personal knowledge and experience which allows them to judge whether a particular piece of litigation complements or diverts the thrust of the movement. In CCR's view, law funds should measure the impact or usefulness of their litigation through a direct contact with the community it seeks to serve.

CCR, therefore, represents a variety of groups and interests. In the context of women's issues, it is best known for its role in reproductive rights cases. CCR has been active in cases establishing rights to abortion: in these instances it was reacting to pressure from the women's movement in New York City where a women's health collective and feminist lawyers combined to challenge state abortion laws. Some of the trials arising from those challenges have been very much in the public eye as a result of flamboyant activist tactics, including courtroom

demonstrations, organized by the community groups working with CCR. Indeed, a combination of legal and political activism has become a trademark of CCR.

A board of directors comprised of lawyers (50 per cent) and representatives of interest groups (50 per cent) administers CCR. Board members are expected to make a commitment to be involved with CCR's work. A flexible approach to the selection of cases is used. Like many law funds, CCR does not have financial eligibility guidelines but it does consider whether an applicant would be as well or better served by going to another public interest law firm or a private law firm. Approximately 50 cases are handled each year.

In its New York office, CCR has a staff of nine lawyers, a director (who also raises funds and engages in political activism), a part-time bookkeeper, an education/public relations person and six secretaries. All staff members receive the same salary and decisions are made collectively. CCR also utilizes volunteer lawyers who have the same responsibilities as staff lawyers, but who work full time elsewhere. Cooperating lawyers in private practice, who are also volunteers, sometimes work with staff members on a case. Legal fees are not paid but money for disbursements is available. Most expert witnesses donate their time.

CCR is a tax-exempt, non-profit organization. Its community concerns are reflected in its fundraising. One quarter of its $500,000 annual budget is raised by direct mail because CCR considers that direct mail is also a vehicle for educating people about its aims and activities. The rest comes from private foundations, small family foundations and churches. Most of the funds raised must be allocated to specific issues by the terms of the donations.

11. League of Women Voters Education Fund (LWVEF)

The League of Women Voters, located in Washington, D.C., is a national, membership-based organization which, unlike groups such as the National Organization for Women, has more narrowly defined interests and goals. They include: voting rights, campaign finances, access to and procedure at political meetings, freedom of information, citizen participation and equality of opportunity.

The League of Women Voters, like the American Civil Liberties Union, has both state and local affiliates.[63]

Since both the national body and its affiliates had become involved in litigation cases, the League (through its non-profit, tax-exempt Education Fund) decided in 1971 to create an in-house litigation department to provide financial assistance and expertise in the cases undertaken by the organization as plaintiff or in which the organization acted as **amicus curiae**. The litigation department also provides advice, precedents and referrals on legal questions in general. Occasionally, on cases raising issues of national importance, the litigation department may itself file an **amicus** brief. Since 1937, the League and its affiliates have been involved in approximately 240 cases. About 25 cases are usually on the litigation department's list at any given time.

The litigation department is chaired by one of the trustees of the Education Fund, and employs a director, a staff lawyer, a legal assistant and an administrative assistant. Although it receives some funding from its parent organization, its principal funding is from the Ford Foundation.

12. National Center for Women and Family Law (NCWFL) and National Employment Law Project (NELP)

Both the National Center for Women and Family Law and the National Employment Law Project are "back-up" centres to the Legal Services Corporation, the federally funded legal aid program for the poor in the United States. There are 17 other similar centres, responsible for different issues.[64]

The back-up centres were designed to provide research, training, information and technical assistance in their areas of responsibility to the regular local office of the Legal Services Corporation. In fact, they also undertake litigation and operate more like specialized local offices. The financial eligibility guidelines of the Corporation limit the client base of the centres. Legal Services Corporation has its roots in the anti-poverty thrust of the Lyndon B. Johnson administration and remains a legal service for the poor. In the case of NCWFL, for instance, a family of four with an income of $10,000 or under would qualify for its

assistance. The number of cases undertaken by these centres is small, usually about a dozen per year. Local offices of the Corporation or lawyers refer most of the cases to the centres.

The larger of the two centres is the National Employment Law Project. Its head office is in New York City and is staffed by five lawyers, two secretaries, three paralegals, a librarian and a manager. It also maintains a Washington, D.C. office which undertakes legislative advocacy. Staffed by two legislative advocates, a secretary and a law student, this office keeps members of Congress informed of legislative developments in employment law.

Fifty to sixty per cent of staff time is devoted to research and resource functions, not to cases under litigation. NELP does not have a network of volunteer or cooperating lawyers and its total budget is about $500,000 per year.

NCWFL, with a total budget of $250,000, is about the same size as the free-standing women's law funds. Three lawyers, two secretaries and a law clerk are on staff. The Center, located in New York City, makes many referrals a year because it takes so few cases. The local offices of the Corporation are not obliged to take family law cases and as a result an estimated 50 per cent of poor women go unrepresented. The Center usually becomes active in a case at the appeal level, although its goal is to obtain relief for the individual or class affected rather than to develop jurisprudence. The Center has found state appellate courts responsive to its interventions. In state courts, the Center believes it is important to be seen as a local participant with a national constituency.

Funding for these centres is obtained primarily from government. The centres have a degree of independence from the Legal Services Corporation because each selects its own board and staff although local bar associations also play a role in selection.

D. A CANADIAN PERSPECTIVE ON THE AMERICAN WOMEN'S LAW FUNDS

Just as United States women's law funds used the NAACP Legal Defense and Educational Fund, Inc. as a model in taking an organized approach to litigation on issues affecting American women, Canadian women can look to the American experience and draw ideas about organization and strategy.

Unlike Canada, the United States from its birth has been governed by a Constitution that is the ultimate legal control on what governments and citizens may or may not do. The courts, not the various state and federal legislatures, are charged with the day-to-day interpretation of that Constitution. Since the Constitution is the touchstone for laws and government practices, a clearly defined constitutional right may limit certain laws and practices. As a result, pressures for social change necessarily focused on the Constitution and a systematic legal strategy became a major tool in the hands of activists. Before presenting our analysis of how the American women's law funds function, a comment on whether they have been effective in achieving law reform is appropriate, given the importance of the decisions facing Canadian women.

Women's law funds have been active in the United States for less than 15 years. Their successes have not come as dramatically or as consistently as they might have expected in the early 1970's following civil rights developments. In particular, they have not convinced the United States Supreme Court that the Fourteenth Amendment should be used rigorously to strike down gender-based discrimination. This has meant that quick and far-reaching advances for the social and economic status of women have not occurred as a result of the litigation. In fact, it may be unrealistic to expect that courts in the United States or Canada will be the spearhead of that type of change. Gradual change over many years is the norm.

In her study reviewing the women's funds supported by the Ford Foundation, Margaret A. Berger evaluates the importance of the strategy of litigation:

> Would equivalent substantive gains have been achieved in the absence of a litigative effort by groups enjoying philanthropic support? Definitely not. Virtually all of the doctrinal development of the seminal issues of sex-based discrimination has been achieved through the efforts of the not-for-profit sector of the bar, and especially through groups funded by foundations.[65]

We already have discussed the distinguishing features of public interest law which support this conclusion: "[it] . . . requires a persistence of effort, resources and management beyond the capabilities of the private litigant."[66]

The same American commentator also has concluded that, apart from its effect on legal theories, litigation by women's funds has increased the effectiveness of existing statutes and executive orders prohibiting sex discrimination:

> The work done by some of the grantees in monitoring the performance of government agencies, both in rule making and enforcement, could not be afforded by women's groups who are the clients, if they had to pay prevailing rates.[67]

While it is difficult for Canadian observers to comment on complex legal developments in another country, we do not see any reason, based on our study, to disagree with Berger's final conclusion about the future:

> Although the courts have not yet taken any giant steps to restructure our society because of the changing role of women, a foundation has been laid on which to build in the future. Although the early momentum in the federal courts has slackened, it is the conclusion of this report that the litigative effort must go forward, even though there may be losses for a time. Litigation alone, no matter how effectively pursued, cannot end sex discrimination, but litigation in conjunction with other lines of attack is an important tool in bringing about change.[68]

Berger's report makes many detailed comments about how the American women's funds have functioned, and what changes would be appropriate to improve their effectiveness in the future. We have made a similar assessment, related in what follows, based on our understanding of the Canadian context in which funds would operate.

Although the women's law funds in the United States serve different communities and have different priorities and structures, several fundamental features characterize their activities.

First, although the funds are not designed to provide standard legal services, they do not operate in isolation from the issues that, from time to time, are important to women's lives and communities. Contact with individuals and groups provides a fund with a spectrum of issues to tackle and a way of assigning priorities to those issues.

Second, the women's law funds did not put all their eggs in the litigation basket. While they were pursuing in court the constitutional prohibition against sex discrimination, they were also lobbying for new legislation to improve women's rights. That proved to be a wise decision because the goal of constitutional change has not yet been reached while real gains have been made in the federal and state legislatures. Litigation is often a crucial partner to lobbying; with the threat of a possible court fight, lobbying has more bite.

Third, the women's law funds purposely place emphasis on activities other than their court cases. These activities include: monitoring of, and advocacy in, legislative and administrative forums; education of the women's constituency and the public generally through speeches, scholarly and popular writing; liaison with other women's groups and development of contacts with the media.

There are several reasons for this emphasis. Both legislators and judges are sensitive to changes in society's thinking about an issue and, to the extent that the funds can assist in bringing about such change, they can make law reform easier. On a small scale, it is advisable to develop new and progressive interpretations or approaches to legal questions and to circulate them in such a way that they come to the attention of, and can be adopted by, players in the legal system. Also, when a case on an important point is unsuccessful, it is important to have political and media skills to use in a public campaign for a change in the law. In this way, even losses in court can be turned to good use.

As an example of the latter point, the United States Supreme Court 1976 decision in **General Electric Company v. Gilbert et al.** triggered a media campaign.[69] In that case the Court agreed that General Electric Company could exclude pregnancy-related disabilities from its sickness and accident disability plan, without offending the employment provisions of Title VII of the **Civil Rights Act,** because a distinction based on pregnancy was not discrimination based on sex. The **Gilbert** case became a visible symbol of women's inequality and the women's movement organized around it to secure a 1978 legislative amendment to Title VII, usually known as **The Pregnancy Disability Act,**[70] which provides that discrimination on the basis of pregnancy is discrimination on the basis of sex.

Fourth, women's law funds are committed to the strategy of systematic litigation described in this report. In its best form, a fund chooses the appropriate case given the existing state of the law and provides legal services to the plaintiff from the trial level through to appeal. The distinguishing feature of this method is that the fund becomes the direct sponsor of the case.

In practice, however, most of the funds sponsor very few cases. Their involvement in cases consists of preparing or joining **amicus curiae** briefs filed at the appellate level. In some cases, such briefs may serve a strategic purpose, for example, to present theory and data when the research presented by the parties is inadequate; to introduce a novel argument so that the court can become accustomed to it; to provide widespread support for a position; or to show a spectrum of opinion.

In our view, the funds have chosen to use briefs instead of sponsoring cases because they simply lack the resources to undertake more cases on a direct sponsorship basis or because they do not dominate an issue area sufficiently to "catch" most cases before they go to trial. In short, it is not a strategy of preference but of necessity.

This situation – of limiting involvement in cases to participation as an **amicus curiae** – has been exacerbated by two trends. As the principal funding source for the women's law funds, foundations are becoming more demanding of results and adequate funding is harder to get. Also, cases where expert evidence is required, such as those involving occupational health and safety, compensation and

benefits, are becoming much more expensive because the defendants – government or corporations – have massive resources to bring to it. Since costs are going up at the same time that funding is in jeopardy, an economic "crunch" has resulted which forces funds to restrict their role in many cases to that of **amicus**. However, law reform results are harder to achieve when a fund appears as **amicus curiae**. The NAACP Legal Defense and Educational Fund, Inc., the model for women's funds, rarely files **amicus** briefs because it believes that if the issue in a case is important, it should always participate as a party (which gives more extensive rights to introduce evidence, cross-examine witnesses and influence the course of the case). As well, it is concerned that the extensive use of **amicus** briefs has devalued their impact on the court.

Apart from direct sponsorship of cases and participation in cases as **amicus curiae**, American funds sometimes use litigation for a third purpose: to generate publicity. Although the participants may have some hope of obtaining a favourable decision, they are frequently equally interested in litigation as a means of enhancing an organization's credibility, of attracting new members and of using a public forum to attract media attention to an issue. The classic example is the use of this strategy by the National Women's Suffrage Association when it sent women to vote before they had received the franchise.

A publicity strategy is not considered an alternative to direct sponsorship of cases. The use of this strategy has real dangers if it is used on its own: cases can be lost, creating hardships for individuals and sometimes leaving a legacy of bad law which must then be overcome by others.

Indeed, the question of publicity raises the whole issue of for whom exactly the funds are working. The American funds have had to fight for their right to sponsor cases against allegations that there is a conflict between the organization's goals and the needs of the individuals involved. The United States Supreme Court has been asked a number of times to consider this question and in two important cases effectively established the funds' right to sponsor cases.

In **National Association for the Advancement of Colored People v. Button, Attorney General of Virginia, et al.**,[71] the Court reviewed a Virginia statute

which prohibited a lawyer from accepting employment or compensation from any person or organization not a party to a judicial proceeding and having no money interest in it. It was also an offence for such a person or organization to solicit business for any lawyer. The Court held that the conduct of NAACP was lawful advocacy and protected by the First and Fourteenth Amendments, which guarantee freedom of expression and freedom of association.

In a later case, **In Re Primus,**[72] the Court considered whether Primus, a cooperating lawyer of the American Civil Liberties Union from South Carolina, should have been disciplined for advising a woman (who had been sterilized in order to receive public medical assistance) on her constitutional rights and offering free legal assistance from ACLU. The Court found that Primus was not seeking personal financial gain and that his lawful conduct was protected by the United States Bill of Rights:

> The ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public .... As **Button** indicates, ... the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants.[73]

The Internal Organization of American Funds

The women's law funds share a history and a theoretical underpinning. However, they do have differences and they can be seen as choices that will confront any similar Canadian venture. The American funds will be compared here on the basis of five organizational factors: membership, funding, management, staff, and legal strategy.

a) Membership

Half of the organizations which we reviewed are membership-based or affiliated with membership-based organizations, with the latter being the most common. The ACLU Women's Rights Project, NOW Legal Defense and Education Fund and Women's Equity Action League grew out of membership-based

organizations which are all national in scope. The only membership-based women's law fund which started "from scratch" is the Women's Legal Defense Fund in Washington, D.C. That group is now considering seeking a national membership, but it has experienced difficulty because it lacks funds or visible issues around which women can coalesce quickly.

The benefits of having a membership base or a link to a membership base include:

(1) a talent pool: it can provide staying power to the organization so that it does not have to rely on a few key people;

(2) credibility before courts or government: the fund can say it represents the interests of a large sector of women;

(3) money: the membership is a loyal source of funds;

(4) community contact: that provides a sense of what the developing issues are and may locate willing plaintiffs;

(5) public support: an informed membership may generate wide support for an issue or diffuse a contentious issue.

There are disadvantages to a membership base as well. It does not guarantee success and appeals for funds may have to reach out beyond the membership. For instance, the ACLU Women's Rights Project and the Women's Legal Defense Fund have a significant track record in direct sponsorship of litigation. However, the core funds for the ACLU Women's Rights Project do not come from its membership-based parent; they come from the Ford Foundation. The Women's Legal Defense Fund draws on its membership primarily for legal services, not direct financial support. NOW Legal Defense and Education Fund and the Women's Equity Action League, both linked to large membership groups, have been frustrated in their attempts to sponsor litigation by their lack of funds. A membership base does not ensure secure internally generated funding at adequate levels, particularly when a fund is associated with a parent organization which needs funds of its own.

A membership must also be serviced, which involves staff time and expenditures. The "servicing" has two aspects: not only must the nuts and bolts of

obtaining and maintaining memberships (for example, sending renewal forms) be done, but also there must be continuing efforts to keep members informed and involved. The key question is whether the cost of servicing a membership is balanced by a return from the membership.

Another negative factor is that a membership base raises the prospect of internal disputes and splits over issues, policy and strategy. The American experience has been that these disputes do develop and that they have real costs, particularly in terms of time lost when a group breaks up into two and the old organization has to rebuild and the new organization has to establish itself, as when those who were to form the Women's Equity Action League split from the NOW Defense and Legal Education Fund in 1968. Fortunately, this type of dissent does not characterize the women's law funds today, which may be a comment on the maturity of the American activity.

The outstanding example of a fund which is not membership-based is the NAACP Legal Defense and Educational Fund, Inc. Although there are benefits to a membership base, NAACP LDEF proves that these benefits can be replicated in a non-membership organization if priority is given to maintaining community links.

b) Funding

The question of funding sources is closely related to that of membership because membership is, in one sense, a funding source. Other sources include government, corporations, individuals (through direct mail campaigns) and foundations. Funds also "earn" money through court-awarded costs, publications and speaking engagements. The experience of the American funds is that fundraising is an essential factor in designing and directing a fund because it has an impact on the nature and number of activities undertaken and because it takes resources to fund-raise adequately. Most of the legal defence funds use a mix of fundraising strategies.

The key source of money for women's law funds, whether membership based or not, has been grants obtained from regional or national **foundations**, primarily the Ford Foundation. Although that contribution is significant, it

represents only a very small proportion of the allotments made by foundations to public interest law generally. A 1974 study illustrates the current pattern:

(1) That year, foundations gave organizations carrying out public interest litigation $33.7 million, which represents only 0.4 per cent of the $80.6 billion they gave to all private non-profit organizations.[74]

(2) Of that $33.7 million given for public interest litigation, women's law funds received approximately 1 per cent, that is, $3.37 million.[75]

Despite the small proportion of foundation money received by women's funds, foundation contributions remain the overwhelmingly largest source of financing. In 1974, 92 per cent of the money raised by women's law funds came from foundations[76] and this proportion has remained more or less the same over the years. This narrow funding base has made these funds particularly vulnerable to shifts in the policies, priorities and expectations of foundations.

For example, foundations often seek control over the type and design of the program being funded. That is why most foundation grants are tied to particular projects, although some legal funds which have credibility or a good track record, such as the NAACP Legal Defense and Educational Fund, Inc., the ACLU Women's Rights Project and the Women's Law Fund, do receive grants which are not tied. The net effect of this style of controlled funding is that an organization is tempted to design its activities to fit a foundation's priorities. This creates a "Catch 22" situation. If the money received is tied, the organization has no core funding – and little money for litigation. As a result it cannot build litigation credibility or a track record to enable the fund to break out of the tied funding pattern.

A further problem is that foundation funding is usually given for a one- or two-year period. Not only does the granting agency reassess the fund at the end of each period, but it may also reassess its own priorities. The fund becomes caught in a cycle of short-term funding which is counter-productive to long-range planning and staff assignments. In addition, if the funding source is not sufficiently broadly based, a cut in a grant will be a severe blow to the organization because of the time it would take to establish new links with another foundation.

When they have sought funding from **government**, the American funds have obtained mostly "tied funds" for specific projects, such as publishing a book or holding seminars on legislation. However, they have not sought "core funding" from government to finance their day-to-day operations because they recognize the potential conflict in taking money from the institution which, in many cases, they are challenging in court.

The only American fund discussed in this report which raises funds using **direct mail campaigns** is the NAACP Legal Defense and Educational Fund, Inc. It is very successful: in 1981 it raised six million dollars by spending one million. Direct mail does require an investment, in the same way that expanding a membership base requires an investment.

The question of which sources of funding are desirable is not a simple one because of competing strengths and limitations in each source. But the goal is clear: to obtain untied funding from a broad base of sources.

c) Management

In general, the American funds have a board of directors with the ultimate responsibility for the control and direction of the organization. A board may be appointed or elected. In a membership organization, the board is usually elected from amongst the membership, each member having one vote. Some organizations prefer to appoint people to the board because the election process limits the board of directors to the current pool of members. Appointments may be made in a variety of ways: the board of directors may appoint its own successors or the staff may invite individuals to join the board.

There are two views about the ideal size and composition of a board of directors. The first is that a small board is preferable – one where the directors attend frequent, regular meetings, are responsible for establishing the goals and priorities, including the selection of cases, and are closely involved in the operation of the organization. Such a board can provide valuable direction to a new organization, act as a source of information and expertise for the staff, provide a

buffer to government or member interference in contentious cases, and be accountable to foundations which provide funding to the organization.

The second view is that an organization should seek a large board and that the directors should be chosen for a variety of qualities – legal expertise, business and financial expertise, access to funding sources, prestige, fame, community roots, academic status and qualifications, geographical representation and balance. Clearly, costs dictate that such large boards meet infrequently and are not involved in the day-to-day functions of the organization. With such boards, it is usual for an executive committee, selected from the board, to meet more frequently and to be responsible for the decisions of the organization between board meetings.

d) Staff

People are essential to the impact and longevity of any organization undertaking litigation on behalf of women. It is our observation that the organizations which have had an impact on law reform for women using litigation as a strategy have been large enough to provide leadership in all aspects of an issue and, in particular, to act as counsel to a major party in every important case on the issue. Although in their relatively short history the women's law funds have not approached the success of the much older NAACP Legal Defense and Educational Fund, Inc. they are, nonetheless, gaining recognition as centres of expertise. As more and better cases come to their attention, they gradually become the fulcrum of law reform in their specialty area, thereby increasing the degree of control which they have over the progression of law in that area.

At the core of the American women's law funds is the legal resources and expertise they have at their disposal. Experience has shown that these resources must be sufficient to take on a number of selected cases each year and to provide legal services in those cases from the trial level through to appeal. It is apparent from our review of the United States funds that an effective organization must have a paid staff in preference to relying on volunteers to provide all legal services. Staff members are responsible for carrying out the goals of the organization and their first priority is to be responsible for the direction and

conduct of selected cases. This system is preferable to relying on volunteer lawyers to fit a case into their normal work schedule.

The short-term nature of most funding available to defence funds and the long-term nature of the work undertaken combine to create uncertainty for staff. As a result, fundraising expertise is also essential to any group and valuable staff resources must be allocated to continuing the search for funds. In our observation, the organizations which have small staffs do so because of financial constraints, not by choice. The negative consequences of having a small staff are apparent: the organization may fall victim to staff exhaustion and burn-out or to dependence on one or two key people. In one extreme case where the key staffperson died, a previously active organization stagnated.

The experience of American funds demonstrates that staff functions should include administration, fundraising, litigation, education, and lobbying. In order to ensure the proper functioning of an organization, tasks should include accounting, personnel, office maintenance, budgets and planning, and reporting to funding sources and to the membership. A full-time fundraiser is desirable, if not essential.

Staff lawyers are needed to review incoming cases to see if the issue involved fits in with the litigation aims of the fund and to judge whether a case will be successful. The staff is also responsible for the conduct of selected cases including drafting pleadings, preparing documents, attending at discoveries and conducting trials. A fund may find it useful to retain and pay a senior lawyer from outside the organization to assist the staff lawyers to conduct difficult and important cases. As well, paralegals should be available to assist staff members so that they can carry a larger caseload.

Staff members should also implement an education outreach program to provide information to all women concerning their legal rights and the activities of the organization. This might be accomplished through a newsletter, public speaking, media contact and through information kits.

Finally, to be effective, the staff should lobby all levels of government to obtain laws, regulations and policies favourable to women; monitor the passage of legislation to ensure that it does not discriminate against women; and monitor government agencies in the enforcement of laws affecting women.

However, no matter how large the paid staff is, it cannot carry out all the goals of the organization. If the organization chooses to be national in scope, as some of the American women's law funds are, it is unrealistic to expect that the staff in the national office will be able to operate effectively in all jurisdictions. To handle this problem, such organizations have established a network of lawyers in each region, the members of which are committed to the goals of the organization and are trained in equality litigation. There are many reasons for this approach. First, most lawyers are qualified to practice in only one jurisdiction. The time and cost to qualify in multiple jurisdictions are prohibitive. Second, it is important that a national organization have a local presence. Potential women litigants may be more likely to seek out assistance in their own locality rather than from a central office. The local lawyer may be a source of potential plaintiffs and can serve as a legal "ear to the ground" with respect to local issues. For example, women employees of American Cyanamid Co. contacted the local lawyer for ACLU in Atlanta, who then forwarded the case to the Women's Rights Project in New York City.[77] Third, it is difficult to conduct litigation by long distance because costs are increased and plaintiffs usually require support on an ongoing basis. Moreover, it may be important in the conduct of a case not to be perceived as an outsider.

A network of lawyers, who are paid directly by a fund, is a valuable part of the litigation team. It makes sense to allocate time and resources to educating members of that network, to keeping them up-to-date on cases and information and to making them feel a part of, and committed to, the overall goals of the organization. However, the experience of the United States funds is that to achieve the goals of the organization and to maintain some control over the direction and quality of the litigation, it is essential to assign a staff lawyer to monitor the progress of a case and to provide technical and expert assistance. The coordinated efforts of the staff lawyers and network lawyers can ensure an effective litigation strategy. The work of the organization must be of the highest quality because its activities will be closely scrutinized by the public, the media and the courts.

e) Legal Strategy

It is important to emphasize that a litigation fund is not like a law firm or legal aid. Its goal is not to provide legal services on a case-by-case basis and not to focus solely on local needs. Rather, the fund chooses as its focus those legal issues which are important to women's rights. American experience shows that to be effective a fund must have a litigation strategy with a sharp issue focus, that is, directed at a very restricted area of the law. Choosing the issues to focus on thus becomes a critical decision. Some of the American funds have clearly chosen to focus on legal questions which they believe are of paramount importance to all women – issues which address the immutable characteristics of women or affect significant numbers of women. These might include discrimination involving pregnancy, employment and pensions. By contrast, some of the funds have been much more specialized, focusing on such issues as academic tenure and access to sports opportunities.

Whatever the issue chosen, the American funds look for cases that are "winnable". The best sort of case is one in which the discrimination is blatant or clearly identifiable: for example, the statutory requirement in some United States jurisdictions that a child must have the religion of the father. The best type of case is also the simplest case, that is, one where there is little dispute as to the facts. The ideal case has a plaintiff with no detracting features and with a strong human interest that will appeal to the courts and to the media. Finally, the plaintiff must be willing to remain in the case until it is completed and not settle or abandon her claim part way through the case.

An integral part of a successful litigation strategy is to follow up cases whether they are won or lost. When the Women's Law Fund in Cleveland was successful in striking down the mandatory maternity leave policies of a school board in 1974, they were flooded with requests to do similar cases. The Fund chose not to follow up this line of case, but instead moved on to other areas of discrimination. Several years later, when a similar issue was raised in **Gilbert v. General Electric Co.**, the woman lost, partly because the composition of the Supreme Court had changed, but also because women's groups had failed to consolidate the earlier victory and to build the jurisprudence of equality on an incremental basis.

Whatever legal issues the organization chooses, it is preferable that the fund conduct the entire case from start to finish. The primary reason is that the pleadings, which are the first step in a case, define the legal issues; shortcomings in them are difficult and expensive to amend at a later date. Also, it is important that the trial be carefully conducted and the best evidence be called to establish the case. Once the trial is completed, the findings of fact made by the trial judge determine the basis for any appeal. It would be most unusual to be allowed to call further evidence at the appeal stage. If a litigation fund does not get involved in a case until the appeal level, it may be left to deal with incomplete information or poorly conceived legal arguments which cannot be overcome on appeal.

It is important for any litigation strategy that a fund occupy the field related to the issues it has chosen. Only then can a fund control the cases brought to court. Without this control, it is difficult to guarantee good cases or to ensure the orderly and incremental evolution of the law. In addition, it is important to obtain the trust of the courts and to be certain that they are familiar with the organization and the legal issues involved.

In the United States there has been a proliferation of women's legal defence funds. There may well be room for a number of organizations doing women's rights litigation provided that their boundaries are sufficiently clearly defined and that they communicate with each other. Each group should seek a separate legal issue to focus on, although it is not always possible because of the issue involved or because of group politics. Looking at the American experience, there has been a fair amount of overlap on issues which caused the funds to waste their efforts. For example, the 1980 attempt by the American Civil Liberties Union to have the compulsory draft struck down – because it discriminated between men and women – involved most of the major women's law funds in the court fight. The case failed, however, setting back the women's goal to achieve equality under the Constitution and sharply dividing the women's groups between those who thought the draft was bad for both sexes, and those who wanted greater access to the education and job opportunities provided by the armed forces for poor and minority women. The overlap in efforts took away valuable resources from other issues. This demonstrates that when there are a number of groups it is essential to have close communication and cooperation in order to establish a common theory and approach.

Nevertheless, diversity on an issue can be valuable, in that all aspects of an issue are thereby canvassed, and a range of opinion from radical to conservative is provided to the court. In that way the court can see the various interests of society and select from the proposed range of solu ions.

In conclusion, if the American experience has taught Canadians anything, it is that there is no easy route to setting up and maintaining a women's law fund. Indeed, the road is fraught with many difficult decisions. We discuss those decisions in the following summary.

CONCLUSION: EQUALITY RIGHTS AND LEGAL ACTION

After looking carefully at some of the landmark legal cases involving matters of crucial interest to women in Canada, and after studying how American women's groups have chosen to play a role in their legal system, we can now outline a course of action. **We have come to the conclusion that a legal action fund to concentrate on issues of sex-based discrimination is an essential component of an effective strategy to promote the interests of women in the Canadian legal system.**

First of all, we find ourselves at the opportune moment to stress litigation as a vehicle for social change. The **Canadian Charter of Rights and Freedoms** has brought about a significant change in our legal system, moving us further from a system where the legislatures are the supreme lawmakers to a system where the courts may be asked to review the activities of legislatures and governments in accordance with the rights established in the Charter.

Unlike American women who have fought with mixed results for a constitutional guarantee of equality through the interpretation of the Fourteenth Amendment and the proposed Equal Rights Amendment, we have achieved a constitutional guarantee of equality through nation-wide lobbying. Section 28 of the Charter came into force on April 17, 1982, and section 15 comes into force on April 17, 1985. The challenge is to make the application of these equality guarantees meaningful and to ensure that the equality theory which our courts will develop and apply on a case-by-case basis is in the best interests of women. Accepting the challenge will necessitate a change in the way Canadian women approach law reform because the role of courts has been enhanced by the Charter. Litigation, more than ever, has been opened up as a strategy to achieve equality.

As we saw in our review of the legal efforts of Canadian women to improve their lives, in the past women have had to take action as individuals and they have had to stand alone. Their cases were isolated ones, not part of an overall scheme to advance equality for Canadian women. The successful cases, such as the **Persons Case**, advanced rights for women and added momentum to subsequent cases and lobbying activities. The losses, such as **Bliss** and **Murdoch**, were devastating to the individual women and also had serious adverse effects on the case law affecting

all women in the years immediately following the decisions. However, as symbols of women's inequality those losses triggered persistent and effective lobbying for legislative change. When we see our rich legacy, we also see how much more powerful a unified approach to change can be.

There can be no doubt that women and men will invoke section 28 of the Charter and section 15 when it comes into force, and that many decisions will be made which will influence how quickly, and by what means, Canadian women achieve equality. It makes sense, then, to find ways to increase the number of successful cases, to pursue the development of legal precedents of real value to the greatest number of Canadian women and to distribute the costs of such activity.

A. WHY A FUND AT ALL?

In our view, Canadian women should not assume that the existing legal system or existing groups will fill the current vacuum and devote sufficient resources to establishing organizations which will pursue Charter litigation in women's interests. It is difficult, if not impossible, for individual lawyers working in relative isolation to do systematic litigation. Furthermore, although lawyers often do provide some legal services at little or no charge, the reality is that they must bill for most of their services in the same way that any business would. They are not motivated, nor should they be expected, to bear the full cost of taking cases which are in the public's interest.

In addition, legal aid schemes do not fit in with the theory of systematic litigation. Generally, legal aid exists to assist people in paying for regular legal services which are important to the conduct of their day-to-day lives. So while economic support is provided, it is provided only where the person is involved in certain types of legal matters and is unable to pay. The worthwhile goals of legal aid do not always mesh with the need to select strategic cases.

Of the Canadian groups organized to undertake legal advocacy, none has selected women's issues as a priority for activity. In addition, none of the Canadian

women's groups organized to focus on various women's issues has undertaken legal advocacy as a priority for activity.

B. ONE FUND OR MORE?

On the one hand, it would seem better to have one large fund because that fund would have the opportunity to achieve greater control over the development of the law of equality than if a variety of funds were pursuing separate legal actions. A single fund would make better use of scarce financial resources whereas a variety of funds would compete for limited public and private monies. A single fund could speak on behalf of a large number of Canadian women with one voice whereas a variety of funds might be perceived as sectarian, divisive and fragmented. One such fund could more easily coordinate its efforts with groups bringing or sponsoring cases on behalf of those in other categories, like race or handicap, which are protected by section 15.

On the other hand, it would be complicated to organize one national legal action fund because lawyers are admitted to practice on a province-by-province basis and very few lawyers are qualified to practise law in more than one province or in both of Canada's two legal systems. One law fund may have difficulty accommodating the variety of legal issues which women in various regions of the country feel are important. As well, differences in political orientation may militate against a single law fund. In fact, a law fund might have to spend so much time and energy keeping itself together in these circumstances that its capacity to undertake litigation may be diminished.

Similarly, there are arguments for and against a variety of funds. The advantages of multiple funds are: the task facing women is enormous and should be shared; the expertise that is developed can be enriched by cooperation and communication amongst funds; funds have a ripple effect in that they provide a valuable service to a community, whether defined by geography or issue; and they enhance the public profile of women's issues and solutions for those issues.

The clear risks are that funds may operate at cross purposes or waste limited resources. Solving these problems, if they occur, will also detract from litigation activity.

The American experience cautions us that when there are several funds it is crucial that they work cooperatively. Resources can be squandered and efforts duplicated or what is worse, cancelled out, if individual funds do not establish "issue focuses" – in other words, priorities or goals – which mesh and contribute to the overall goal of equality.

Over and above the foregoing considerations, however, is the pending implementation of section 15. It seems to us that some fund with substantial resources is essential to ensure that cases are found and prepared in time to establish a responsible presence in the field of equality after April 1985. Furthermore, cases invoking equality rights will begin to enter the courts at that time and women will wish to become involved in cases brought by other parties under sections 15 and 28 to protect their interests and to contribute to the clarification of the law. One fund will have a better opportunity of doing this than would a number of funds in their formative stages.

After weighing all of those arguments, we believe that one national fund is the most attractive option for now.

C. WHAT WILL THE FUND DO?

In our view, a legal action fund concentrating on the litigation of equality under the Charter should take, as the basis of its method of operation, the systematic approach to litigation developed in the United States. As described in this report, that approach would require taking the following four basic steps:

(1) defining a goal in terms of the desired principle of law to be established;

(2) plotting how the principle of law can be established from case to case in incremental, logical and clear steps;

(3) selecting winnable cases suitable for each stage taken to achieve the goal;

(4) consolidating wins at each stage by bringing similar cases to create a cluster of cases in support of the principle established.

Implicit in this theory are two fundamental organizational principles: first, **success is dependent upon direct sponsorship of cases**; second, **cases which will frustrate or complicate the development of the principle should be avoided if possible.**

The importance of these two principles cannot be underestimated. The success or failure of the American women's law funds can be measured, in large part, by the extent to which direct sponsorship of all cases in a given area has been possible. The ACLU Women's Rights Project, which uses direct sponsorship more than most of the other women's groups, has had more impact in achieving equality in areas such as employment than have the NOW Legal Defense and Education Fund and the Women's Equity Action League which have relied primarily on an **amicus** strategy. Drawing upon the historical development of public interest litigation in the United States, the specific experience of the women's law funds and the Canadian groups discussed earlier, **we conclude that the direct sponsorship of litigation is the most productive strategy and therefore the strategy of first choice for any Canadian fund.** It is the most expensive option, but it is potentially the most productive. Moreover, in Canada, there may not be another option. It is becoming increasingly difficult for non-parties to intervene in ordinary court proceedings and it is difficult to predict how receptive courts will be to such interventions in Charter cases. In any case, it would not be advisable to use the scarce resources and time of a women's fund to wage a campaign to broaden the law on interventions when the preferred course of action is direct sponsorship of cases either by being the plaintiff itself or by providing the legal services for the individual woman plaintiff. As well, even in direct sponsorship, there may be one more hurdle to face in Canadian law. Unlike the American law of public interest litigation, the right of a fund to sponsor cases is not necessarily assured in Canada.

The merit of systematic litigation is that it is premised on an appreciation of how law develops in the judicial system. Left to its own devices, the development of law on a case-by-case basis tends to be uneven and unpredictable because judges can only decide on the case that is before them and no one plans the order in which the cases arise or the issues they will deal with. The systematic approach to litigation attempts to impose some order on this process by following the four basic steps outlined above. Implicit in this process is the commitment to the development of law in a steady, predictable manner over a long period of time.

There can be no better time than the present for Canadian women to contemplate undertaking such systematic litigation. Largely as a result of energetic lobbying pursued by Canadian women, the wording of the equality rights provision of the Charter makes a clear break with the restrictive interpretation of the equality rights provision of the **Canadian Bill of Rights** developed in the **Lavell** and **Bliss** cases discussed in Chapter I. The time is right to begin to develop a theory of equality that will meet the expectations of Canadian women.

D. HOW WILL THE FUND BE STRUCTURED?

The next consideration is: what should be the structure of the fund? Ideally, a fund should have a membership base. It will take time and effort to establish a large base but our review of the American funds showed us that a large national membership provides the organization with a source of funds, longevity and impact both in lobbying efforts and in the courts.

A fund should start off with **a small working board of directors;** some directors can be chosen for their legal expertise so that they can provide information and assistance to the staff on a regular basis. Directors with stature in the community can attract funds to the undertaking.

A successful fund needs adequate staff. There must be a commitment to a large enough staff to ensure the ongoing existence of the organization. A skilled fundraiser is essential. An administrator is necessary to perform the functions of accounting, personnel, office maintenance, budgets, planning, and reporting to the

funding sources and the membership. The fund should have lawyers on staff: they will work with the board to establish legal priorities, to review and select cases and to conduct litigation through trial. As well, the fund should plan to retain more senior lawyers to give advice from time to time and to take charge of the difficult and important cases. Staff members must also have a commitment to the ongoing education of women with respect to their legal rights and be prepared to lobby for legislative change.

E. WHERE WILL THE MONEY COME FROM?

Once the important decision is made to establish a fund, the next question to deal with is: where will the money come from? Our review of American funds showed us that finding adequate funding is a perennial time-consuming concern. When we look at the prospects for fundraising in Canada, it is clear that there are differences from the American situation. First, there is simply not as much private foundation money available in Canada for any kind of public interest work. Second, foundations in Canada do not appear to have a history of commitment to funding civil rights or human rights projects. This lack of involvement may be because the foundations have not been approached or it may be because the foundations have not perceived these issues to be important. In any event, the foundations may not be as rich a source of seed money as in the United States.

Third, the Canadian women's groups have accepted considerable funds from governments over the past number of years. However, it must be recognized that the principal defendant in Charter cases will be the provincial or federal government. Canadian organizations such as the Consumers' Association of Canada and the Public Interest Advocacy Centre have not faced this problem because they participate in regulatory settings where their target is most often the regulated party, for example, Bell Canada, and not the government itself. The Canadian Civil Liberties Association, whose adversary is often the government, makes it a policy never to accept government funding.

Fourth, there are real benefits in securing money from a broad membership base. The contributors feel that they have a stake in the process and will assist the organization to flourish. With a widespread membership base, the fund can speak with greater authority.

As well, in the United States the normal rule is that each party pays its own legal costs win or lose. In Canada, on the other hand, the normal rule is that the losing party must pay the costs of the winner. Thus, Canadian funds face the possibility of a real financial drain due to the structure of our court system. In litigation under the Charter this will mean that an individual who loses may have to pay the costs of the government which has successfully opposed her case. She, in turn, will look to the fund for indemnification (compensation) of the costs awarded against her as well as for her own legal costs. These expenses must be built into any litigation scheme.

Several valuable lessons are apparent from the American experience. **Every attempt should be made to obtain funding from a variety of sources – from individuals and corporations as well as foundations – so that failure to have one grant renewed will not jeopardize the life of the organization. The amount of tied funds should be controlled,** or the organization will begin to replace its priorities with those of its funders. Sufficient funds must be raised in order to ensure that staff members are not required to work for insufficient compensation and so that an adequate staff can be hired for the workload; expertise is developed over time and a high staff turnover or rate of burn-out can significantly hinder a fund's effectiveness. This is particularly important in Canada because very few lawyers have experience in equality litigation. Finally, **legal action funds should give high priority to developing permanent fundraising skills** and allocate sufficient staff resources to that task.

F. BEYOND LITIGATION

Even though we strongly believe in the necessity to create a women's legal action fund, we also believe that **litigation should not be seen as a replacement for the varied activities of the women's movement.** The long-term goal of equality

for women will best be furthered by a strategy which combines public education, lobbying, use of the media, law reform, education of lawyers and the judiciary, as well as litigation. Litigation is time-consuming, expensive, and a risky route for change. A win may be interpreted to affect only the parties who are before the court while the interpretation of a loss may act to limit the progress of all women for years. Litigation is a blunt instrument, with large downside costs and generally does not provide for accommodation or compromise. On the other hand, litigation may be the most effective means of achieving change on an issue. The American and Canadian experience has shown that as a strategy for change, litigation should be used in conjunction with other tools.

A legal action fund or funds would strengthen the general aim of the organized women's movement in Canada – equality. The optimum situation would be to have an overall strategy combining a number of elements.

First, efforts must continue to ensure that the **public is educated to raise its awareness of equality and discrimination issues.** The staff of a fund can contribute to this by establishing and building contacts with the media, by creating media events around issues, by public speaking, and by being a resource for information and materials for other lawyers concerning the issues. It is critical to the long-term success and existence of a fund that it build links to the public, so that the fund is seen as a respected and necessary institution for the community. Judges, too, live in the real world and are not immune to public perceptions.

Second, as have many other women's groups, **the fund must establish a presence at all levels of government** so that it can lobby for legislative change, ensure that new laws do not discriminate against women and monitor the government's enforcement of legislation. It is important that a fund have visibility and credibility in the community so that when it appears before public bodies seeking changes, politicians and government officials will listen, not only because of the content of the presentation, but also because of the constituency or interest group that the fund is seen to represent. Over time, the fund staff will be seen by governments, politicians and civil servants as a valuable information resource and will be consulted before laws are drafted. It must be realized that essential cases

will be lost in the courts. It is important then to have built contacts with legislators so that laws can be enacted to reverse such losses.

Third, **it is critical to build a theory of equality which is accepted by academics, lawyers and the judiciary.** Legal writing in respected law journals, presentation of papers at legal seminars or "educationals", and participation in judges' training sessions are all means of disseminating and legitimizing such theories of equality. It will be important to coordinate these endeavours with other organizations such as lawyers' professional groups, or with those who seek equality on the basis of race, age, or mental or physical handicap. An exchange of ideas and resources will benefit all such groups and further the definition of equality.

Finally, **the fund can be a resource centre for other litigants and women's groups.** For example, fund staff might assist in drafting pleadings and act as a clearinghouse for the most recent cases and legal writings in an area of law. The staff might also collect economic and statistical data on the effects of discrimination, including retaining experts who will give evidence in court, and who can predict future trends in society to assist in planning a long-term litigation strategy.

How an organization undertakes these activities, and the extent to which it undertakes these activities, will determine its structure, its size, and its effectiveness. We have learned from the American experience that these combined activities, although expensive and time-consuming, are effective in achieving the goal of equality. We have learned from our own experience that Canadian women can sustain a commitment to litigation, both financially and with other resources, and we suspect that with an organized long-term approach the gains of Canadian women made through litigation could parallel and strengthen those made through legislative lobbying.

The challenge is ours.

APPENDIX 1

The following people provided the researchers with information and perspectives on the material in this report:

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Picker, Jane	Originally incorporated WLF
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Viskelety, Beatrice	Montreal Association of Women and the Law
Woods, Laurie	Executive Director, NCWFL
Yee, Lisa	NELP

APPENDIX 2 **United States Legal Defence Funds**

	Funding Sources				
	Membership Base	Foundation Grants	Private Donations	Government	Staff Lawyers
WRP	No	X	X		X
NOW LDEF	No	X	X	X	X
WEAL	X	X	X	X	X
WLDF	X	X	X	X	X
WLF	No	X	X	X	X
WLP	No	X	X		X
ERA	No		X		X
NWLC	No	X		X	X
CCR	No	X	X		X
LWVEF	No	X			X
NCWFL	No			X	X
NELP	No			X	X

Fundraiser(s) on Staff	Issue Focus	Non-profit Corporations with Tax-exempt Status	Free Standing
No	employment discrimination, non-traditional employment, fringe benefits, pensions, insurance	X	No (ACLU)
3	wide range – no limits	X	No (NOW)
1	education, military and sports	X	No (WEAL)
Administrative Director does part-time fundraising	wide range	X	Yes
No	employment discrimination	X	Yes
No	equal rights provisions in state constitutions	X	Yes
Director does part-time fundraising	wide range involving sex discrimination	X	Yes
No	education, employment, health, insurance, problems of sport and third world women	X	Yes
Director does part-time fundraising	wide range	X	Yes
No	voting rights, campaign finances, freedom of information, equality of opportunity, citizen participation	X	No (League of Women Voters)
No	poverty	No	No (Legal Services Corporation)
No	poverty	No	No (Legal Services Corporation)

APPENDIX 3
United States Legal Defence Funds:

Women's Rights Project (WRP)
American Civil Liberties Union
132 West 43rd Street
NEW YORK, N.Y.
(212) 994-9800

NOW Legal Defense and Education Fund (LDEF)
36 West 44th Street
Suite 1201
NEW YORK, N.Y.
10036
(212) 354-1225

Women's Equity Action League (WEAL)
805 15th Street North West
Suite 822
WASHINGTON, D.C.
20005
(202) 638-4560

Women's Legal Defense Fund, Inc. (WLDF)
2000 P Street North West
Suite 400
WASHINGTON, D.C.
20036
(202) 887-0364

Women's Law Fund, Inc. (WLF)
1621 Euclid Avenue
Suite 620, Keith Bldg.
CLEVELAND, Ohio
44115
(216) 621-3443

Women's Law Project (WLP)

112 South 16th Street
Suite 1012
PHILADELPHIA, PA.
19102
(215) 564-6280

Equal Rights Advocates, Inc. (ERA)
1370 Mission Street
7th Floor
SAN FRANCISCO, CA.
94103
(415) 621-0505

National Women's Law Centre (NWLC)
1751 N Street North West
WASHINGTON, D.C.
20036
(202) 872-0670

Center for Constitutional Rights (CCR)
853 Broadway
14th Floor
NEW YORK, N.Y.
10003
(212) 874-3303

League of Women Voters Educational Fund (LWVEF)
1730 M Street North West
WASHINGTON, D.C.
20036
(202) 429-1965

National Center for Women and Family Law (NCWFL)
799 Broadway
Room 402
NEW YORK, N.Y.
10003
(212) 674-8400

National Employment Law Project (NELP)
475 Riverside Drive
Apartment 240
NEW YORK, N.Y.
10115
(212) 870-2121

APPENDIX 4
Canadian Advocacy Groups:

Canadian Civil Liberties Association
229 Younge Street, Suite 403
Toronto, Ontario
M5B 1N9
(416) 363-0321

General Counsel: A. Alan Borovoy
Administrative Co-ordinator: Helen Cainer

Consumers' Association of Canada
Southvale Plaza, Level III
2660 Southvale Crescent
Ottawa, Ontario
K1B 5C4
(613) 733-9450

President: Mrs. Barbara Shand
14 Ridgevalley Crescent
Islington, Ontario
M9A 3J6

Public Interest Advocacy Centre
1407 Yonge Street
Toronto, Ontario
M4T 1Y8
(416) 928-0487

General Counsel: Andrew Roman

Advocacy Resources Centre for the Handicapped
40 Orchard View Boulevard
Toronto, Ontario
M4R 2G1
(416) 484-8255

Executive Director: David Baker

Canadian Environmental Law Association
8 York Street, Fifth Floor South
Toronto, Ontario
M5J 1R2
(416) 366-9717

Director of Litigation: Grace Patterson
Counsel: Robert Timberg, Toby Vigod

NOTES

INTRODUCTION

1. **Canada Act 1982**, c. 11 (U.K.), Schedule B.

2. **Ibid.**, Part I.

3. **Ibid.**, s. 52.

CHAPTER I

1. R.S.C. 1970, c. C-34.

2. R.S.C. 1970, c. U-2.

3. R.S.C. 1970, c. I-6.

4. R.S.C. 1970, c. D-8.

5. Formerly the **British North America Act, 1867**, renamed the **Constitution Act, 1867**, by the **Constitution Act, 1982, supra**, n. 1, ss. 53(1).

6. R.S.C. 1970, App. III.

7. In **R. v. Dudak** (1978), 41 C.C.C. (2d) 31, the British Columbia Court of Appeal held that section 195.1 does not extend to the activities of the male customer, but this case was not followed in the later decision of **R. v. DiPaola; R. v. Palatics** (1978), 43 C.C.C. (2d) 199 (Ontario Court of Appeal). Of course, the Crown would argue that section 195.1 is valid under the Charter because male, as well as female, prostitutes are charged under it.

8. **An Act respecting the Constitution Act, 1982**, S.Q. 1982, c. 21.

9. See generally: Mary Eberts, **Women and the Law: Cases and Materials** (Toronto: University of Toronto, Faculty of Law, 1976), c. 7.

10. S.O. 1892, c. 32.

11. **An Act to amend the Act to Provide for the Admission of Women to the Study and Practice of Law**, S.O. 1895, c. 27.

12. (1897), **Canada Law Journal**, vol. 44, p. 133.

13. **In Re Mabel P. French** (1905), 37 N.B.R. 359 (S.C.), at p. 360.

14. S.N.B. 1906, c. 5.

15. **In Re Mabel P. French** (1912), 17 B.C.R. 1; [1912] 1 W.W.R. 488 (C.A.).

16. **An Act to remove the Disability of Women so far as relates to the Study and Practice of Law**, S.B.C. 1912, c. 18.

17. **Dame Langstaff v. The Bar of the Province of Quebec** (1915), 47 Q.S.C. 131 at pp. 139-140, **per** Saint-Pierre, J. See also: Margaret Gillett, **We Walked Very Warily: A History of Women at McGill** (Montreal: Eden Press Women's Publications, 1981), pp. 303-314.

18. **Dame Langstaff (Annie MacDonald) v. The Bar of the Province of Quebec** (1915), 25 Que. K.B. 11 (C.A.).

19. **An Act respecting the Bar**, S.Q. 1941, c. 56.

20. **An Act to amend the Notarial Atc** (sic), S.Q. 1955-56, c. 62.

21. **An Act to amend "An Act to amend the Law Society Act"**, S.M. 1912, c. 32.

22. **The Statute Law Amendment Act 1912-13**, S.S. 1912-13, c. 46, s. 27.

23. **An Act to amend Chapter 164, Revised Statutes of 1900, The Barristers' and Solicitors' Act**, S.N.S. 1917, c. 41.

24. The figures for this chart were obtained by telephone interviews with officials of the law societies of the provinces and territories in early 1984.

25. See generally: Mary Eberts, "The Persons Case", **Status of Women News**, vol. 5 (1979), p. 16, and Eleanor Harmon, "Five Persons from Alberta" in **The Clear Spirit**, Mary Quayle Innis, ed. (Toronto: University of Toronto Press, 1966), pp. 158-178.

26. **In the Matter of a Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867**, [1928] S.C.R. 276; (1928), 4 D.L.R. 98.

27. **Edwards et al. v. Attorney General of Canada et al.** (1930), 99 L.J.P.C. (N.S.) 27; [1930] A.C. 124.

28. Kathleen Jamieson, **Indian Women and the Law in Canada: Citizens Minus** (Ottawa: Canadian Advisory Council on the Status of Women, 1978).

29. (1973), 38 D.L.R. (3d) 481, at 509.

30. Jamieson, p. 8.

31. **Attorney General of Canada v. Lavell; Isaac et al. v. Bédard**, [1974] S.C.R. 1349; (1974), 38 D.L.R. (3d) 481.

32. This information was obtained during a telephone conversation with Clayton Ruby, Jeannette Lavell's counsel before the Supreme Court of Canada.

33. **Attorney General of Canada et al. v. Canard et al.**, [1976] 1 S.C.R. 170; (1975), 52 D.L.R. (3d) 548.

34. This information was obtained during a telephone conversation with William Rachman.

35. Canada, **Report of the Royal Commission on the Status of Women in Canada** (Ottawa: Information Canada, 1970), Appendix, no. 245, p. 462.

36. This information was obtained during a telephone conversation with Mary Two-Axe Early at the beginning of 1984.

37. Suzette Couture, "A Question of Status", **Today Magazine** (November 29, 1980), p. 5.

38. 21 GAOR, Supp. 16 at p. 49, U.N. Doc. A/6316 (1966). See generally: Ton J.M. Zuijdwijk, "The Right to Petition the United Nations Because of Alleged Violations of Human Rights", **The Canadian Bar Review**, vol. 59 (1981), p. 103.

39. For documents relating to the case, see: New Brunswick Human Rights Commission, **Selected Documents in the Matter of Lovelace versus Canada Pursuant to the International Covenant on Civil and Political Rights** (September 4, 1981).

40. "Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights", **Canadian Native Law Reporter**, vol. 1 (1982), p. 1.

41. R.S.C. 1980, c. L-1.

42. 75 C.L.L.C. 14, 287 (B.C.).

43. **Canadian Air Line Flight Attendants' Association v. Pacific Western Airlines Ltd.** (1979), 105 D.L.R. (3d) 477; [1980] 1 W.W.R. 646, affirmed (1981), 124 D.L.R. (3d) 688.

44. Canadian Human Rights Commission, "Release", April 24, 1980.

45. Applications are made under the **Unemployment Insurance Act, 1971**, S.C. 1970-71-72, c. 48, s. 30.

46. **Bliss v. Attorney General of Canada** (1977), 16 N.R. 254.

47. **Bliss v. Attorney General of Canada**, [1979] 1 S.C.R. 183.

48. **Ibid.**, p. 190.

49. S.C. 1980-81-82-83, c. 143, s. 2.

50. Parents' Information Bureau, **Birth Control Trial** (Kitchener, 1937); Gerald Stortz, "Of tactics and prophylactics", **Canadian Lawyer**, vol. 6 (1982), p. 4.

51. R.S.C. 1927, c. 36, ss. 207(c) (sic).

52. **R. v. Palmer**, [1937] 2 D.L.R. 609 (Ont. Mag. Ct.).

53. **R. v. Palmer**, [1937] O.W.N. 371; [1937] 3 D.L.R. 493 (C.A.).

54. **An Act to amend the Food and Drugs Act and the Narcotic Control Act and to make a consequential amendment to the Criminal Code**, S.C. 1968-69, c. 41, s. 2.

55. **R. v. Morgentaler** (No. 5) (1973), 14 C.C.C. (2d) 459; (1974), 42 D.L.R. (3d) 444 (Que. Q.B.).

56. [1974] C.A. 129; (1974), 47 D.L.R. (3d) 211.

57. **Morgentaler v. The Queen**, [1976] 1 S.C.R. 616; (1975), 53 D.L.R. (3d) 161.

58. **Criminal Law Amendment Act, 1975**, S.C. 1974-75-76, c. 93, s. 75.

59. **Re Simms and H.** (1979), 38 N.S.R. (2d) 432; (1980), 106 D.L.R. (3d) 435 (Family Ct.).

60. **Dehler v. Ottawa Civic Hospital et al.** (1979), 25 O.R. (2d) 748; (1980), 101 D.L.R. (3d) 686 (H.C.J.); affirmed (1980), 29 O.R. (2d) 677; (1981), 117 D.L.R. (3d) 512 (C.A.).

61. **Minister of Justice (Can.) v. Borowski**, [1981] 2 S.C.R. 575; [1982] 1 W.W.R. 97; (1982), 24 C.P.C. 62.

62. **Borowski v. Minister of Justice of Canada and Minister of Finance of Canada**, [1983] 3 W.W.R. 505 (Sask. Q.B.).

63. **Morgentaler et al. v. Ackroyd et al.** (1983), 42 O.R. (2d) 659 (H.C.J.) and **R. v. Morgentaler et al.**, reasons for decision of Associate Chief Justice Parker, S.C.O., July 20, 1984.

64. As reported in **Murdoch v. Murdoch**, [1975] 1 S.C.R. 423, at p. 443.

65. [1975] 1 S.C.R. 423; [1974] 1 W.W.R. 361; (1974), 41 D.L.R. (3d) 367.

66. See: "Contingency Fees", **infra**.

67. This information was obtained during a telephone conversation with Ernest Shymka.

68. **Murdoch v. Murdoch** (1977), 26 R.F.L. 11; [1977] 1 W.W.R. 16 (Alta. S.C.).

69. **An Act respecting matrimonial regimes**, S.Q. 1969, c. 77.

70. S.Q. 1977, c. 72.

71. **An Act to establish a new Civil Code and to reform family law**, S.Q. 1980, c. 39.

72. Calculated from Canada, Statistics Canada, **Corporation and Labour Unions Return Act**, Part II, Report for 1981, catalogue 71-202, p. 41; Canada, Statistics Canada, **The Labour Force**, December 1981, catalogue 71-001, Table 86, p. 111.

73. **Ibid.**

74. Canada, Statistics Canada, **Corporation and Labour Unions Return Act**, Part II, Report for 1981, catalogue 71-202, p. 52.

75. For a detailed account of the unionization process see: Mary Cornish and Laurell Ritchie, **Getting Organized** (Toronto: The Women's Press, 1980).

76. The Bank Book Collective, **An Account to Settle** (Vancouver: Press Gang Publishers, 1979).

77. Information for February 1984 obtained from the Canada Labour Relations Board, Ottawa.

78. **Canada Labour Code**, R.S.C. 1970, c. L-1.

79. For a more detailed account of the banks' opposition see: Julie White, **Women and Unions** (Ottawa: Canadian Advisory Council on the Status of Women, 1980), pp. 42-46.

80. **Ibid.**, pp. 95-103; see also: Constance Backhouse, "The Fleck Strike: A Case Study in the Need for First Contract Arbitration", **Osgoode Hall Law Journal**, vol. 18 (1980), pp. 495-553.

81. Julie White, "Current Issues for Women in the Federal Public Service" (Ottawa: Canadian Advisory Council on the Status of Women, May 1983), pp. 6-9.

82. Information obtained during a telephone conversation on November 6, 1981, with Ann Bell, president of the Newfoundland Advisory Council on the Status of Women and former member of the Executive of the Corner Brook Status of Women Council and a subsequent interview with Glenda Tulk of the Corner Brook Status of Women Council.

83. **Elsie Hollahan and the Minister of National Revenue**, decision of Dubinsky, D.J., dated March 10, 1980.

84. R.S.C. 1970, c. I-2.

85. Anne Bayefsky, "The Jamaican Women Case and the Canadian Human Rights Act: Is Government Subject to the Principle of Equal Opportunity?", **Western Ontario Law Review**, vol. 18 (1979/80), p. 461.

86. **Re Lodge et al. and Minister of Employment and Immigration** (1978), 86 D.L.R. (3d) 553 (F.C.T.D.).

87. [1979] 1 F.C.R. 775; (1979), 94 D.L.R. (3d) 326 (F.C.A.).

88. Interview with Action-Travail des femmes, November 1982, and records of the Canadian Human Rights Commission.

89. "Probe finds sexual bias in prison system", **The Globe and Mail**, December 5, 1981, p. 1.

90. **Canadian Human Rights Commission Newsletter-Bulletin**, vol. 5, no. 1 (January 1982), p. 5.

91. **R. v. Pappajohn**, [1979] 1 W.R.R. 562; (1979), 45 C.C.C. (2d) 67 (B.C.C.A.).

92. **Pappajohn v. The Queen**, [1980] 2 S.C.R. 120.

93. Information obtained during telephone conversations in December 1982 with Lynn Smith, a Vancouver lawyer, and Carol Pfeifer of Vancouver Rape Relief.

94. S.C. 1980-81-82-83, c. 125, s. 19.

95. **R. v. Tourangeau**, British Columbia Provincial Court, August 5, 1977 (unreported).

96. Quotes found in the submission of the British Columbia Federation of Women, the Vancouver Status of Women, and the Service, Office and Retail Workers' Union of Canada to the Inquiry of the Judicial Council of British Columbia into the Remarks made by His Honour Judge Albert Bewley at the trial of Anthony Tourangeau on August 25, 1977.

97. **R. v. Tourangeau**, B.C. Court of Appeal, November 1, 1977 (unreported).

98. This information was obtained during a telephone conversation in December 1982 with Lynn Smith.

99. Report of an Inquiry by the Judicial Council of British Columbia, February 7, 1978.

CHAPTER II

1. The rules setting out the procedure to be followed in each province and territory generally can be found in the following:

   - **The Supreme Court Rules**, Alta. Reg. 390/68;
   - **Rules of Court**, B.C. Reg. 310/76;
   - **The Queen's Bench Rules**, Man. Reg. 26/45;
   - **Rules of the Supreme Court**, S.O.R. (N.B.) 1963, Reg. 90;
   - **The Rules of the Supreme Court**, scheduled to **The Judicature Act**, C.S. Nfld. 1916, c. 83;
   - **The Supreme Court Rules**, (N.W.T.) S.O.R./79-768;
   - **Civil Procedure Rules** (N.S.);
   - **Rules of Practice**, R.R.O. 1980, Reg. 540;
   - **Code of Civil Procedure**, S.Q. 1965, c. 80;
   - **Civil Procedure Rules** (P.E.I.);
   - **The Queen's Bench Rules** (Sask.);
   - Pursuant to ss.14(1) of the **Judicature Ordinance**, R.O.Y.T. 1978, c. J-1, the Rules of the Supreme Court of British Columbia are in force in the Yukon Territory.

2. **Minister of Justice et al. v. Borowski et al.**, [1981] 2 S.C.R. 575, at p. 598; [1982] 1 W.W.R. 97, at p. 117 **per** Martland, J.; 24 C.P.C. 62.

3. The corresponding provision in each of the common law provinces and territory is as follows:

   - **The Supreme Court Rules**, Alta. Reg. 390/68, r. 42;
   - **Rules of Court**, B.C. Reg. 310/76, r. 5(11) - (13). Also applies in the Yukon Territory, **supra**, n. 1;
   - **The Queen's Bench Rules**, Man. Reg. 26/45, r. 58;
   - **The Rules of the Supreme Court**, S.O.R. (N.B.) 1963, Reg. 90, Order 16, r. 9;
   - **The Rules of the Supreme Court**, scheduled to **The Judicature Act**, C.S. Nfld. 1916, c. 83, Ord. 15, r. 9;
   - **The Supreme Court Rules**, (N.W.T.) S.O.R./79-768, Order 6, r. 52;
   - **Civil Procedure Rules**, N.S., r. 5.09;
   - **Rules of Practice**, R.R.O. 1970, Reg. 545, r. 75;
   - **Civil Procedure Rules**, P.E.I., r. 5.09;
   - **The Queen's Bench Rules**, Sask., r. 45.

4. **General Motors Canada v. Naken et al.**, [1983] 1 S.C.R. 72.

5. **An Act respecting the class action**, S.Q. 1978, c. 8.

6. **Code of Civil Procedure of Quebec**, R.S.Q., c. C-25, article 1003.

7. **An Act respecting the class action**, S.Q. 1978, c. 8, Title II, c. II.

8. This information was obtained in a telephone conversation with the Fonds d'aide au recours collectif of Quebec in early 1984.

9. Ontario Law Reform Commission, **Report on Class Actions** (3 vols.), 1982.

10. [1945] O.R. 778; [1945] 4 D.L.R. 674.

11. C.R.C. 1978, c. 1512.

12. [1974] S.C.R. 1349; (1974), 38 D.L.R. (3d) 481.

13. [1976] 1 S.C.R. 616; (1975), 53 D.L.R. (3d) 161.

14. [1981] 1 F.C. 289; (1981), 114 D.L.R. (3d) 154 (F.C.A.).

15. (1978), 17 O.R. (2d) 593 (H.C.), at p. 598 **per** Evans, C.J.H.C.

16. **Supra**, n. 13.

17. **Muller v. Oregon**, 208 U.S. 412; 28 S.Ct. 324; 52 L. Ed. 551 (1908).

18. Babcock, Freedman, Norton and Ross, eds., **Sex Discrimination and the Law; Cases and Remedies** (Boston: Little, Brown and Company, 1975), p. 37.

19. **Supra**, n. 2.

20. [1983] W.W.R. 505 (Sask. Q.B.).

21. **Palmer v. N.S. Forest Industries** (1983), 2 D.L.R. (4d) 397 (N.S.S.Ct.).

22. The rules for contingency fee arrangements can be found in the following:

- **Barristers and Solicitors Act**, R.S.B.C. 1979, c. 26, ss. 99(5);
- **The Supreme Court Rules**, Alta. Reg. 340/68, rr. 615-618;
- **The Law Society Act**, R.S.M. 1970, c. L100, s. 49;
- **The Supreme Court Rules** (N.W.T.), S.O.R. /79-768, ss. 553-558;
- By-law passed pursuant to s. 15(2), **An Act respecting the Bar**, R.S.Q. 1977, c. B-1;
- **Judicature Act**, R.S.N.B. 1973, c. J-2, Section 73;
- **Civil Procedure Rules**, N.S., rr. 63.17-63.22.

23. Previously to be found in the **Criminal Code**, S.C. 1953-54, c. 51, ss. 8(a).

24. See, for example, **Martell et al. v. Consett Iron Co.**, [1955] Ch. 363.

25. [1955] Ch. 363, **per** Danckwerts, J., at p. 387; affirmed at [1955] Ch. 389 (C.A.).

26. [1955] Ch. 389 (C.A.) **per** Jenkins, L.J., at p. 420.

27. **Grieg v. National Amalgamated Union of Shop Assistants** (1905-06), 22 T.L.R. 274 (K.B.) and **Hill v. Archbold,** [1968] 1 Q.B. 688 (C.A.).

28. **Carlson v. Chambers,** [1947] 1 W.W.R. 353 (Sask. K.B.) **per** Anderson, J., at p. 359; [1947] 2 D.L.R. 667.

29. See: the differing views of Danckwerts, J., Jenkins, L.J., and Hodson, L.J., in **Martell, supra,** n. 25, at pp. 387-88, 421 and 427 respectively.

30. Information Circular no. 80-10, dated August 29, 1980, issued by the Department of National Revenue, Taxation.

31. See: L.A. Sheridan, "Charitable Causes, Political Causes and Involvement", **The Philanthropist,** vol. 2, no. 4 (Fall, 1980), pp. 5-20.

32. **Ibid.**

33. Information Circular no. 78-3, dated February 27, 1978, issued by the Department of National Revenue, Taxation, paras. 4 and 5.

34. **Supra,** n. 12.

35. **Attorney General of Canada et al. v. Canard,** [1976] 1 S.C.R. 170; (1975), 52 D.L.R. (3d) 548.

36. **Re Lodge et al. and Minister of Employment and Immigration** (1978), 86 D.L.R. (3d) 553 (F.C.T.D.); on appeal, [1979] 1 F.C.R. 775; (1979), 94 D.L.R. (3d) 326.

37. **An Act to amend the Law Society Act,** S.O. 1951, c. 45.

38. O.N.W.T. 1979-80, c. 18. Legal aid is provided in the other provinces pursuant to the following legislation:

- **Legal Services Society Act,** R.S.B.C. 1979, c. 227;
- **The Legal Aid Services Society of Manitoba Act,** S.M. 1971, c. 76;
- **Legal Aid Act,** R.S.N.B. 1973, c. L-2;
- **The Legal Aid Act,** S.N. 1975, c. 42;
- **Legal Aid Planning Act,** S.N.S. 1970-71, c. 14;
- **Legal Aid Act,** R.S.O. 1980, c. 234;
- **Legal Aid Act,** R.S.P.E.I. 1974, c. L-10;
- **Legal Aid Act,** R.S.Q. 1977, c. A-14;
- **The Community Legal Services (Saskatchewan) Act,** R.S.S. 1978, c. C-20;
- **Legal Aid Ordinance,** R.O.Y.T. 1975 (3d) c. 2;
- The Legal Aid Society of Alberta has been incorporated under the **Societies Act,** R.S.A. 1980, c. S-18, and the plan is based on an agreement between the province and the Law Society dated July 1, 1970.

39. **The Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria,** [1981] 2 S.C.R. 181; (1981), 124 D.L.R. (3d) 193.

40. Legislation creating the 11 human rights commissions are as follows:

Canadian Human Rights Act, S.C. 1976-1977, c. 33;
Individual's Rights Protection Act, R.S.A. 1980, c. I-2;
Human Rights Code, R.S.B.C. 1979, c. 186;
The Human Rights Act, S.M. 1974, c. 65;
Human Rights Act, R.S.N.B. 1973, c. H-11;
The Newfoundland Human Rights Code, R.S.N. 1970, c. 262;
Human Rights Act, S.N.S. 1969, c. 11;
Human Rights Code, S.O. 1981, c. 53;
Human Rights Act, S.P.E.I. 1975, c. 72;
Charter of Human Rights and Freedoms, S.Q. 1975, c. 6;
The Saskatchewan Human Rights Code, S.S. 1979, c. S.24.1.

41. **Fair Practices Ordinance**, R.O.Y.T. 1971, c. F-2.

42. **Ibid.**

43. 30-31 Vict., c. 3 (U.K.), formerly known as the **British North America Act, 1867**, name changed pursuant to ss. 53(2) of the **Constitution Act, 1982, supra**, Chapter I, n. 1.

44. In the case of **The Board of Governors of Seneca College, supra**, n. 39. The Supreme Court of Canada held that there is no separate tort action for discrimination.

45. **Charter of Human Rights and Freedoms**, R.S.Q. 1977, c. C-12.

46. **Re Dagg and Ontario Human Rights Commission** (1980), 26 O.R. (2d) 100 (H.C.J. - Div. Ct.).

47. **Ibid.**

48. **Susan Ballantyne v. Molly 'N' Me Tavern** (1982), 4 C.H.R.R. D/1191.

49. Employment standards statutes in the provinces and territories are as follows:

Canada Labour Code, R.S.C. 1970, c. L-1;
Employment Standards Act, R.S.A. 1980, c. E-10.1;
Employment Standards Act, S.B.C. 1980, c. 10;
The Employment Standards Act, R.S.M. 1970, c. E110;
Employment Standards Act, S.N.B. 1982, c. E-72, not proclaimed as of February 1984;
The Labour Standards Act, S.N. 1977, c. 52;
Labour Standards Ordinance, R.O.N.W.T. 1974, c. L-1;
Labour Standards Code, S.N.S. 1972, c. 10;

Employment Standards Act, R.S.O. 1980, c. 137;
Labour Act, R.S.P.E.I. 1974, c. L-1;
Labour Standards Act, S.Q. 1979, c. 45;
The Labour Standards Act, R.S.S. 1978, c. L-1;
Labour Standards Ordinance, R.O.Y.T. 1971, c. L-1.

See also human rights legislation, n. 5.

50. **Downing v. Graydon** (1978), 21 O.R. (2d) 292 (C.A.), reversing 17 O.R. (2d) 26 (H.C.J. - Div. Ct.).

51. **Criminal Code**, R.S.C. 1970, c. C-34 is the primary criminal legislation.

52. **Criminal Code**, R.S.C. 1970, c. C-34, s. 453.

53. Ontario Supreme Court, December 18, 1978 (unreported).

54. Ontario County Court (unreported).

55. **Supra**, Chapter I, n. 75.

56. Labour relations between employees and trade unions are generally governed by the following legislation:

Canada Labour Code, R.S.C. 1970, c. L-1;
Labour Relations Act, R.S.A. 1980, c. L-1;
Labour Code, R.S.B.C. 1979, c. 212;
The Labour Relations Act, S.M. 1972, c. 75;
Industrial Relations Act, R.S.N.B. 1973, c. I-4;
The Labour Relations Act, 1977, S.N. 1977, c. 64;
Trade Union Act, S.N.S. 1972, c. 19;
Labour Relations Act, R.S.O. 1980, c. 228;
Labour Act, R.S.P.E.I. 1974, c. L-1;
Labour Code, R.S.Q. 1977, c. C-27;
The Trade Union Act, R.S.S. 1978, c. T-17.

CHAPTER III

1. The information on CCLA was obtained during a meeting with Alan Borovoy, general counsel, and telephone conversations with Erika Abner, research director.

2. CCLA has appeared as an intervenor in the Supreme Court of Canada in **R. v. Miller and Cockriell**, [1971] 2 S.C.R. 680; **Morgentaler v. The Queen**, [1976] 1 S.C.R. 616; **Nova Scotia Board of Censors et al. v. McNeil**, [1976] 2 S.C.R. 265 and [1978] 2 S.C.R. 662; and **A.G.N.S. v. MacIntyre** (1982), 49 N.S.R. (2d) 609. CCLA has been refused permission to intervene by the Supreme Court of Canada in **Vaillancourt v. The Queen**, [1976] 1 S.C.R. 13; **Solosky v. The Queen**, [1980] 1 S.C.R. 821 and **Bliss v. A-G. Canada**, Supra,

Part I, n. 68. The one case in which CCLA appeared in the Supreme Court of Canada as a party is **The Solicitor General of Canada and the Royal Canadian Mounted Police v. The Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario and the Canadian Civil Liberties Association,** [1981] 2 S.C.R. 494. Prior to the coming into force of the **Canadian Charter of Rights and Freedoms,** CCLA appeared as an intervenor in two cases in the Ontario Court of Appeal: **R. v. Saxell** (1981), 33 O.R. (2d) 78; **Re Dowson and The Queen** (1981), 62 C.C.C. (2d) 286. It also appeared as an intervenor in "The Body Politic" case: **R. v. Pink Triangle Press et al.** (1980), 51 C.C.C. (2d) 485 (Ont. Co. Ct.). CCLA was unsuccessful in obtaining **amicus curiae** status before the Ontario High Court when the Honourable Joe Clark, Leader of the Opposition, challenged the Uranium Information Security Regulations: **Re Clark et al. and Attorney General of Canada** (1977), 17 O.R. (2d) 593; it was also denied leave to intervene in **Re Board of Education for the Borough of North York and Ministry of Education** (1978), 19 O.R. (2d) 547 (H.C.J.). In **Cheslock v. Ministry of Community and Social Services,** unreported decision of Ontario Divisional Court, February 26, 1982, counsel for CCLA withdrew his application to intervene when the Court ruled in Mrs. Cheslock's favour on her welfare appeal.

At least two other unsuccessful attempts at intervening have not been reported in the law reports. CCLA was refused permission to intervene in the appeal to the Quebec Court of Appeal of an award of an injunction limiting picketing of Dominion Stores by farm workers and their supporters (citation not available). CCLA was not granted leave in the Ontario County Court hearing of a charge under the **Election Expenses Act** against former City of Toronto plumbing inspector Alex Risdon, for distributing leaflets critical of a candidate in a federal by-election: **Risdon v. The Queen,** unreported decision of Whealey, Co. Ct. J., October 24, 1980. When denied leave to intervene in the Risdon case, the CCLA lawyer appeared as co-counsel for the accused to argue the **Canadian Bill of Rights** point that CCLA had intended to put forward as an intervenor. Staff lawyers acted for a man denied a licence to operate a carnival by the Windsor Police Commissioners, in **Re Powell and Windsor Police Commissioners,** [1968] 2 O.R. 613 (H.C.J.); for Indians arrested for blocking the International Bridge at Cornwall in order to assert their rights under the Jay treaty; and on behalf of a youth charged under a municipal by-law with being in a public park after dark (citations unavailable).

CCLA volunteer lawyers have acted in **Fardella v. The Queen,** [1974] 2 F.C. 465 (C.A.); **Button v. Ministry of Manpower and Immigration,** [1975] F.C. 277; **Re Zaduk and The Queen** (1979), 24 O.R. (2d) 362 (C.A.).

3. **Re Ontario Film and Video Appreciation Society and Ontario Board of Censors** (1983), 41 O.R. (2d) (Div. Ct.); (1984), 45 O.R. (2d) 80 (C.A.).

4. **R. v. Oakes,** [1983] 2 C.C.C. (2d) 339 (C.A.). CCLA was refused leave to intervene before the Supreme Court of Canada.

5. R.S.C. 1970, c. N-1.

6. **Borowski v. Minister of Justice of Canada and Minister of Finance of Canada, supra,** Chapter I, n. 62.

7. **R. v. Moore,** Supreme Court of Canada, May 17, 1983; see also n. 3.

8. Consumers' Association of Canada, **1980-81 Annual Report Regulated Industries Program** (May 1981), 100 pp.

9. **Ibid.,** p. 12.

10. **Ibid.,** p. 100.

11. The information on PIAC was obtained during a telephone conversation with Andrew Roman, general counsel, and a subsequent review of PIAC's annual reports.

12. **Lipkovitz, Joy and the Association for Public Broadcasting in British Columbia v. The Canadian Radio-television and Telecommunications Commission and Canadian Cablesystems Limited and Premier Communications Limited** (1982), 45 N.R. 383 (Ed. C.A.).

13. Public Interest Advocacy Centre (PIAC), **Annual Report 1980** (Toronto: PIAC), pp. 26-27.

14. Telecom Decision CRTC 78-7, 4 C.R.T. 313.

15. The information on ARCH was obtained during a telephone conversation with David Baker, executive director.

16. R.S.O. 1980, c. 539.

17. R.S.O. 1980, c. 137.

18. **Re On Our Own et al. and Dr. E.P. King,** unreported decision of Mr. Justice Galligan of the Ontario Divisional Court dated November 7, 1980.

19. **Re City of North York Restricted By-law 27223** (1981), 11 O.M.B.R. 56. Appeal submitted to Cabinet in August 1980; as of February 1984, a decision has not been rendered.

20. S.O. 1981, c. 53.

21. Paul C. Weiler, **Reshaping Workers' Compensation in Ontario** (November 1980).

22. The information on CELRF and CELA was obtained during an interview on November 5, 1981, with Grace Patterson, director of litigation, and Toby Vigod, counsel.

23. Canadian Environmental Law Association, **Annual Report 1982-83.**

24. Canadian Environmental Law Research Foundation, **Annual Report 1981-82**, Statement of Revenues and Expenditures.

CHAPTER IV

1. See generally: Richard Kluger, **Simple Justice** (New York: Vintage Books, 1977), chapter 16.

2. **Brown et al. v. Board of Education of Topeka, Shawnee County, Kansas et al.** 98 F. Supp. 797 (D. Kansas 1951).

3. 98 F. Supp. 797 (D. Kansas 1951); rev'd 347 U.S. 483 (1954), at p. 494, reargued on the question of relief, 349 U.S. 294 (1955).

4. **Ibid.**, at pp. 300-301.

5. See generally: The Council of Public Interest Law, **Balancing the Scales of Justice: Financing Public Interest Law in America** (Washington, D.C: 1976).

6. **Ibid.**, p. 22.

7. **Ibid.**, p. 24.

8. **Ibid.**, p. 34.

9. **Ibid.**, p. 40.

10. **Ibid.**, p. 41.

11. U.S. Const. Amend. XIV, 1, 1 U.S.C. (1976).

12. 88 U.S. (21 Wall) 162.

13. Karen O'Connor, **Women's Organizations' Use of the Courts** (Toronto: Lexington Books, 1980), pp. 33-34.

14. 208 U.S. 412 (1908).

15. Barbara A. Babcock et al., eds., **Sex Discrimination and the Law: Causes and Remedies** (Toronto: Little, Brown and Company (Canada) Limited, 1975), p. 29.

16. **Ibid.**, p. 37.

17. Isabelle Katz Pinzler et al., "Equal Protection-Overview", **Women Working Together, 13th National Conference on Women and the Law 1982 Sourcebook** (Detroit: 13th National Conference on Women and the Law, 1982), at p. 17.

18. 368 U.S. 57 (1961).

19. Dr. Ruth B. Cowan, "Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976", **Columbia Human Rights Law Review**, vol. 8 (Spring-Summer 1976), p. 379.

20. Margaret A. Berger, **Litigation on Behalf of Women: A Review for the Ford Foundation** (New York: Ford Foundation, 1980), pp. 17-18.

21. **Ibid.**, p. 20.

22. This information on the history and operation of NAACP and NAACP LDEF was obtained from Jack Greenberg, director-counsel, and Jean Fairfax, director of Legal Information and Community Services, during interviews in New York City on June 11 and 14, 1982.

23. **Supra**, n. 1.

24. 163 U.S. 537 (1896).

25. Clement E. Vose, "NAACP Strategy in the Covenant Cases", **Western Reserve Law Review**, vol. 6, p. 101.

26. **McLaurin v. Oklahoma State Regents for Higher Education et al.** 339 U.S. 637 (1950); **Sweatt v. Painter et al.** 210 S.W. (2d) 442 (Texas Civ. App. 1948), rev'd 339 U.S. 629 (1950).

27. **Supra** n. 1, at pp. 13-28.

29. NAACP LDEF **1981-82 Annual Report.**

30. **Ibid.**

31. 465 P. 2d 635 (Idaho Sup. Ct. 1970).

32. 404 U.S. 71 (1971).

33. Information on ACLU and ACLU WRP was obtained from Isabelle Katz Pinzler, director, and Joan Bertin, staff counsel, during interviews in New York City on June 10 and 11, 1982.

34. **ACLU Women's Rights Report**, vol. 2 (Spring, 1980), p. 2.

35. **Supra**, n. 13, at p. 123.

36. **Supra**, n. 34, at p. 5.

37. 411 U.S. 677 (1973).

38. ACLU has a national membership with a head office in New York City, a legislative office in Washington, D.C., and two regional offices in Atlanta and Denver. There are 50 ACLU branches, organized primarily by state, and

eight national chapters. The branches and national chapters are autonomous, but they share ACLU income, participate in national policy decision making and take united action on national goals. Each affiliate decides what issues to emphasize and which cases to pursue.

Most legal services provided by ACLU are undertaken by volunteer lawyers. There are about 60 staff lawyers distributed among the affiliates and the national organization and they are capable of handling 1,000 court cases a year. In fact, using volunteer lawyers, ACLU litigates more than 6,000 court cases a year and handles uncounted thousands of administrative issues which require legal skills. (**Guardian of Freedom**, ACLU pamphlet made available June 10, 1982.)

The board of directors of ACLU, which meets four times a year, consists of representatives of the affiliates and at-large members elected by the affiliates' boards and the national board on a population-weighted basis. A much smaller executive committee meets more frequently. The executive committee also serves as the board of directors of ACLU Foundation, a separate but related organization which supports tax-deductible projects, including WRP and other litigation, research and educational projects such as the Reproductive Rights Project. Neither ACLU Foundation nor WRP has a separate membership base.

ACLU Foundation appoints a 15-member advisory committee for WRP which meets once a year. The key working part of the advisory committee is the litigation subcommittee, comprised of five lawyers, which is responsible for deciding what cases WRP will sponsor.

39. **Supra**, n. 13, at pp. 125-126, citing pp. 1-2 of the WRP Memo to Affiliate Lawyers, Re: Second Women's Caucus at the ACLU Biennial (undated).

40. Professor Clement Vose, a leading writer on the United States Constitution, has apparently suggested that the Supreme Court follows the law reviews, not the election returns. See: J. Peltason, **Federal Courts in the Political Process** (New York: Random House, 1955), p. 21.

41. Information on NOW and NOW LDEF was obtained from Phyllis Segal, legal director, during interviews in Washington, D.C. in October 1981, and in New York City on June 10, 1982.

42. Betty Friedan, **It Changed My Life** (New York: Random House, 1976), p. 87.

43. M.L. Carden, **The New Feminist Movement** (Russel Sage Foundation, 1974).

44. NOW LDEF, **1980 Annual Report**.

45. NOW LDEF, "How to Seek Support for Cases and Projects", New York: 1981.

46. NOW LDEF, 1981 Financial Statements.

47. Information on WEAL was obtained from Jeanne Atkins, staff lawyer, during an interview in Washington, D.C., on October 13, 1981.

48. **Supra**, n. 13, at p. 105.

49. WEAL Articles, Incorporation and Amendments, Washington, D.C.

50. WEAL, "Women and Fellowships (1981)", Judith Nies, 1976 WEAL report update.

51. **Califano v. Webster** 430 U.S. 313 (1977).

52. WEAL, **Legal Defense Program and Procedures for WEAL Cases.**

53. WEAL, **Washington Report** (Washington, D.C.: WEAL).

54. Information on WLDF was obtained from Judith Lichtman, executive director, Claudia Schechter, administrative director, and Lauren Taylor, community educator, during an interview in Washington, D.C., on October 13, 1981.

55. One of the most useful publications to a Canadian audience may be the annual review of cases pertaining to women's issues in the United States Supreme Court published annually by WLDF in conjunction with a seminar held in the fall at the beginning of each new term. Each volume also contains capsule reviews of significant decisions affecting women from past terms.

56. Information on WLF has been taken from its publications and from an interview with Jane Picker in Toronto in January 1983.

57. 414 U.S. 632 (1974).

58. Information on WLP was taken from a letter from Elena Aldrete, office manager, dated May 20, 1982, and WLP publications.

59. Information on ERA was obtained from Nancy Davis, director, during an interview in San Francisco in September 1982.

60. Information on NWLC was obtained from a letter from Marcia Greenberger, managing attorney, dated April 6, 1982.

61. Civil Action no. 76527, settled by Order on December 5, 1978 (unreported).

62. Information on CCR was obtained during an interview with Rhonda Copelon in New York City on June 13, 1982.

63. Information on LWVEF was obtained from a letter from Maureen Thornton, director of the Litigation Department, dated July 6, 1982.

64. Information on NCWFL was obtained from Laurie Woods, executive director, during an interview in New York City on June 14, 1982. Information on NELP was obtained from Lisa Yee during an interview in New York City on June 14, 1982.

65. **Supra**, n. 20, at p. 53.

66. **Ibid.**, p. 53.

67. **Ibid.**, p. 54.

68. **Ibid.**, p. 67.

69. 429 U.S. 125 (1976).

70. P.L. 95-555.

71. 371 U.S. 415 (1962).

72. 436 U.S. 412 (1977).

73. **Ibid.**, p. 431.

74. **Supra**, n. 5, at p. 90.

75. **Supra**, n. 5, Figure II-8, at p. 97.

76. **Supra**, n. 5, at p. 98.

77. **Christman v. American Cyanamid Co.** On January 29, 1980, ACLU WRF filed an action against American Cyanamid Co. alleging sex discrimination in employment on behalf of 13 women employees and applicants for employment. The alleged discrimination includes claims that the company excluded all fertile women from certain positions in which they were exposed to toxic substances which allegedly could harm a fetus. Only women who could present proof of surgical sterilization would be permitted to retain those positions. As a result, five women submitted to sterilization operations. Other plaintiffs complain that the company demoted and transferred women who refused to undergo sterilizations, that the company has denied women equal bidding rights and violated the privacy of its women workers, and that the company discriminates against women applicants, as a class, in hiring. Plaintiffs also allege that the defendant has violated rights secured by state law in fraudulently inducing them to submit to sterilizations, in intruding upon their privacy, and by intentionally inflicting emotional harm. For these injuries, plaintiffs seek equitable and legal remedies, including an injunction restraining the defendant from implementing such an exclusionary policy, back pay, damages, and an order requiring equal treatment of women applicants.

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The Canadian Advisory Council on the Status of Women was established as an independent advisory body in 1973 in response to a recommendation by the Royal Commission on the Status of Women. Its mandate, "to bring before the government and the public matters of interest and concern to women" and "to advise the Minister on such matters relating to the status of women as the Minister may refer to the Council for its consideration or as the Council may deem appropriate", is wide and may be interpreted to cover all Council activities on behalf of Canadian women.

The Council is an autonomous agency that reports to Parliament through the Minister Responsible for the Status of Women. This allows the Council to maintain a voice within Parliament and at the same time maintain the right to publish without ministerial consent.

The following were members of the Canadian Advisory Council on the Status of Women at the time of publication (1984):

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